WISCONSIN STATUTES

AND

ADMINISTRATIVE CODE

RELATING TO THE PRACTICE OF

PRIVATE DETECTIVES

AND

PRIVATE SECURITY PERSONNEL

FEBRUARY 2003

State **of** Wisconsin
Department of Regulation and Licensing
Private Detective Advisory Council
1400 E. Washington Avenue PO **Box** 8935
Madison WI 53708

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INTRODUCTION

This booklet is a collection of statutes and rules which relate to the practice of private detectives, private detective agencies and private security personnel in Wisconsin.

The licensing of private detectives has been in effect for many years. The regulation of private security personnel, however, was transferred from local law enforcement agencies to the Department of Regulation and Licensing on July 1, 1997. This regulation was contained in 1995 Wisconsin Act 461.

This booklet will also assist persons preparing for the private detective examination. Examination questions will be based on the information in this booklet and on the information in the following two textbooks which focus on investigative skills and techniques, as well as other skills needed by private detectives. These references do not include all acceptable sources of information, nor is it suggested that the answers to all questions in the examination are specifically found in these references.

Fundamentals of Criminal Investigations by Charles E. O'Hara and Gregory L. O'Hara
6th Edition, 1994, or later
Charles C. Thomas, 2600 South First Street, Springfield, IL 62794-9265

Techniques of Legal Investigation hy Anthony **M.** Golec
Second Edition, 1985, or later
Charles C. Thomas, 2600 South First Street, Springfield, IL 62794-9265

Private detective applicants are encouraged to read additional material, take special courses when they can, and attend special training classes when available to further their knowledge and skills as a private detective.

The development of the law in this area is ongoing. Therefore, these rules and statutes may be revised subsequent to the printing of this book. Most local libraries maintain current sets of Wisconsin Administrative Code and the Wisconsin Statutes. These documents as well as other state publications are available from the Department of Administration, Document Sales Division, PO Box 7840, Madison, WI 53707.

All Wisconsin Statutes and Administrative Codes are available on the Internet at the following addresses:

Statutes: http://www.legis.state.wi.us/rsb/statutes.html

Rules: http://www.legis.state.wi.us/rsb/code/codtoc.html

CHAPTER 15
STRUCTURE OF THE EXECUTIVE BRANCH

SUBCHAPTER I
GENERAL PROVISIONS

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SUBCHAPTER I.
GENERAL PROVISIONS.

15.001 Declaration of policy. (1) THREE BRANCHES OF GOVERNMENT. The "republican form of government" guaranteed by the U.S. constitution contemplates the separation of powers within state government among the legislative, the executive and the judicial branches of the government. The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the executive branch carries out the programs and policies and the judicial branch has the responsibility for adjudicating any conflicts which might arise from the interpretation or application of the laws. It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law.

(2) GOALS OF EXECUTIVE BRANCH ORGANIZATION. **(a)** As the chief administrative officer of the state, the governor should he provided with the administrative facilities and the authority to carry out the functions of the governor's office efficiently and effectively within the policy limits established by the legislature.

(b) The administrative agencies which comprise the executive branch should be consolidated into a reasonable number of departments and independent agencies consistent with executive capacity to administer effectively at all levels.(c) The integration of the agencies in the executive branch should be on a functional basis, so that programs can be coordinated.

(d) Each agency in the executive branch should be assigned a name commensurate with the scope of its program responsibilities, and should be integrated into one of the departments or independent agencies of the executive branch as closely as the conflicting goals of administrative integration and responsiveness to the legislature will permit.

(3) GOALS OF CONTINUING REORGANIZATION. Structural reorganization should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to changing emphasis or public needs, and should be consistent with the following goals:

(a) The organization of state government should assure its responsiveness to popular control. It is the goal of reorganization to improve legislative policy–making capability and to improve the administrative capability of the executive to cany out these policies.

(b) The organization of state government should facilitate communication between citizens and government. It is the goal of reorganization through coordination of related programs in function–oriented departments to improve public understanding of government programs and policies and to improve the relationships between citizens and administrative agencies.

(c) The organization of state government shall assure efficient and effective administration of the policies established by the legislature. It is the goal of reorganization to promote efficiency hy improving the management and coordination of state services and by eliminating overlapping activities.

History: 1991 a. 316.

15.01 Definitions. **In** this chapter: **(1g)** "Affiliated credentialing board" means a part–time body that meets all of the following conditions:

(a) Is attached to an examining hoard to regulate a profession that does not practice independently of the profession regulated by the examining board or that practices in collaboration with the profession regulated by the examining hoard.

(b) With the advice of the examining board to which it is attached, sets standards of professional competence and conduct for the profession under the affiliated credentialing hoard's supervision, reviews the qualifications of prospective new practitioners, grants credentials, takes disciplinary action against credential holders and performs other functions assigned to it by law.

(1r) "Board" means a part–time body functioning as the policy-making unit for **a** department or independent agency or a part–time body with policy–making or quasi–judicial powers.

(2) "Commission" means **a** 3–member governing body in charge of a department or independent agency or of a division or other subunit within a department, except **for** the Wisconsin waterways commission which shall consist of 5 members, the parole commission which shall consist of 8 members, and the Fox River management commission which shall consist of 7 members. **A** Wisconsin group created for participation in a continuing interstate body, or the interstate body itself, shall be known as **a** "commission", hut is not **a** commission for purposes of **s.15.06.** The parole commission created under **s.15.145** (1) shall be known **as** a "commission", but is not a commission for purposes of s.15.06. The sentencing commission created under **s.15.105** (27) shall be known as a "commission" but is not a commission for purposes of s. **15.06** (1) to (4m), (7), and (9).

(3) "Committee" means a part–time body appointed to study a specific problem and to recommend **a** solution or policy alternative with respect to that problem, and intended to terminate on the completion of its assignment. Because of their temporary nature, committees shall be created by session law rather than by statute.

(4) "Council" means a part–time body appointed to function on a continuing basis for the study, and recommendation of solutions and policy alternatives, of the problems arising in a specified functional area of state government, except the Wisconsin land council has the powers specified in s. 16.965 **(3)** and *(5)* and the powers granted to agencies under ch. 227, the Milwaukee River revitalization council has the powers and duties specified in s. 23.18, the council on physical disabilities has the powers and duties specified in s. 46.29 (1) and (2), and the state council on alcohol and other drug abuse has the powers and duties specified in s. 14.24.

(5) "Department" means the principal administrative agency within the executive branch of Wisconsin state government, but does not include the independent agencies under subch. III.

(6) "Division," "bureau," "section" and "unit" means the subunits of a department or an independent agency, whether specifically created by law or created by the head of the department or the independent agency for the more economic and efficient administration and operation of the programs assigned to

the department or independent agency. The office of justice assistance in the department of administration and the office of credit unions in the department of financial institutions have the meaning of "division" under this subsection. The office of the long–term care ombudsman under the board on aging and long–term care and the office of educational accountability in the department of public instruction have the meaning of "bureau" under this subsection.

(7) "Examining board" means a part–time body which sets standards of professional competence and conduct for the profession under its supervision, prepares, conducts and grades the examinations of prospective new practitioners, grants **licenses,** investigates complaints of alleged unprofessional conduct and performs other functions assigned to it by law. "Examining board" includes the board of nursing.

(8) "Head", in relation **to** a department, means the constitutional officer, commission, secretary or board in charge of the department. "Head", in relation to an independent agency, means the commission, commissioner or board in charge of the independent agency.

(9) "Independent agency" means **an** administrative agency within the executive branch created under subch. III.

History: 1977 c. 29, 274; 1979 c. 34; 1983 a. 27, 189, 371,410, 538; 1985 a. 29, 120, 180; 1987 s. 27, 342, 399 1989 a 31, 107, 202 1991 a 39, 269, 315; 1993 a 16, 107, 210, 215; 1995 a. 27 ss. 74 and 9145 (1); 1995 a. 442, 462; 1997 a. 27, 237; 2001 a. 16, 105, 109.

15.02 Offices, departments and independent agencies. The constitutional offices, administrative departments and independent agencies which comprise the executive branch of Wisconsin state government are structured **as** follows:

(1) SEPARATE CONSTITUTIONAL **OFFICES.** The governor, lieutenant governor, secretary of state and state treasurer each head **a** staff to be termed the "office" of the respective constitutional officer.

(2) PRINCIPAL ADMINISTRATIVE **UNITS.** The principal administrative unit of the executive branch is **a** "department" or an "independent agency". Each such unit shall bear a title beginning with the words "State of Wisconsin" and continuing with "department of..." or with the name of the independent agency. A department may be headed by a constitutional officer, a secretary, a commission or **a** board. An independent agency may be headed by a commission, a commissioner **or** a board.

(3) INTERNAL STRUCTURE. **(a)** The secretary of each department may, subject to sub. (4), establish the internal structure within the office of secretary ***so*** **as** to best suit the purposes of his or her department. No secretary may authorize the designation of "assistant secretary" as the official position title of any employee of his or her department.

(b) For field operations, departments may establish district or area offices which may cut across divisional lines of responsibility.

(c) **For** their internal structure, all departments shall adhere to the 'following standard terms, and independent agencies are encouraged to review their internal structure and to adhere **as** much as possible to the following standard terms:

1. The principal subunit of the department is the "division". Each division shall be headed by **an** "administrator". The office of justice assistance in the department of administration and the office of credit unions in the department of financial institutions have the meaning of "division" and the executive staff director of the office of justice assistance in the department of administration and the director of credit unions have the meaning of "administrator" under this subdivision.

2. The principal subunit of the division is the "bureau". Each bureau shall be headed by a "director". The office of the long–term care ombudsman under the board on aging and long–term care and the office of educational accountability in the department of public instruction have the meaning of "bureau" under this subdivision.

2m. Notwithstanding subds. 1. and 2., the principal subunit of the department of tourism is the "bureau", which shall be headed by a "director".

3. If further subdivision is necessary, bureaus may be divided into subunits which shall be known as "sections" and which shall be headed by "chiefs" and sections may be divided into subunits which shall be known as "units" and which shall be headed by "supervisors",

(4) INTERNAL ORGANIZATION AND ALLOCATION **OF** FUNCTIONS. The head of each department **or** independent agency shall, subject to the approval of the governor, establish the internal organization of the department or independent agency and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head may delegate and redelegate to any officer or employee of the department or independent agency any function vested by law in the head. The governor may delegate the authority to approve selected organizational changes to the head of any department or independent agency.

History: 1971 c. 261; 1973 c. 12; 1975 c. 39; 1977 c. 29; 1979 c. 221; 1987 a. 27, 399; 1993 a. 16, 184, 215, 491; 1995 a. 27 ss. 75, 76, 76c and 9145 (1); 1997 a. 27.

Limits of internal departmental reorganization discussed. 61 Atty. Gen. 306.

15.03 Attachment for limited purposes. Any division, office, commission, council or board attached under this section to **a** department or independent agency or a specified division thereof shall be a distinct unit of that department, independent agency or specified division. Any division, office, commission, council or board so attached shall **exercise** its powers, duties and functions prescribed by law, including rule making, licensing and regulation, and operational planning within the area of program responsibility of the division, office, commission, council **or** board, independently of the head of the department or independent agency, but budgeting, program coordination and related management functions shall be performed under the direction and supervision of the head of the department or independent agency, except that with respect to the office of the commissioner of railroads, **all personnel** and biennial budget requests by the office of the commissioner of railroads shall be provided to the department of transportation as required under s. 189.02 **(7)** and shall be processed and properly forwarded by the public service commission without change except as requested and concurred in by the office of the commissioner of railroads.

History: 1981 c. 347; 1983 a. 27; 1993 a. 123; 1999 a. 9.

15.04 Heads of departments and independent agencies: powers and duties. **(1)** DUTIES. Each head of **a** department **or** independent agency shall:

(a) ***Supervision.*** Except as provided in s. 15.03, plan, direct, coordinate and execute the functions vested in the department **or** independent agency.

(b) ***Budget.*** Biennially compile a comprehensive program budget which reflects all fiscal matters related to the operation of the department or independent agency and each program, subprogram and activity therein.

(c) *Advisory* ***bodies.*** In addition to any councils specifically created by law, create and appoint such councils or committees as the operation of the department or independent agency requires. Members of councils and committees created under this general authority shall serve without compensation, but may be reimbursed for their actual and necessary expenses incurred in the performance of their duties and, if such reimbursement is made, such reimbursement in the case of an officer or employee of this state who represents an agency **as** a member of such a council **or** committee shall be paid by the agency which pays the officer's or employee's salary.

(d) *Biennial* ***report*** On or before October 15 of each odd–numbered year, submit to the governor and the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2), a report on the performance and operations of the department or independent agency during the preceding biennium, and projecting the goals and objectives of the department or independent agency as developed for the program budget report. The secretary of administration may prescribe the format of the report and may require such other information deemed appropriate. Each department or independent agency shall provide a copy of its biennial report to legislators upon request. Any department or independent agency may **issue** such additional reports on its findings and recommendations as its operations require. A department or independent agency may, on or before October 15, submit an annual report prepared by it, **in** place of the biennial report required under this paragraph, if the submission **of** the annual reports is approved by the secretary of administration.

(e) ***Seal.*** Have authority to adopt a seal for the department or independent agency.

(f) *Bonds.* Have authority to require that any officer or employee of the department or independent agency give an official bond under ch. 19, if the secretary of administration agrees that the position held by such officer or employee requires bonding.

(g) *Discrimination* ***review.*** In order to determine whether there is any arbitrary discrimination on the basis of race. religion, national origin, sex, marital status or sexual orientation as defined in s. 111.32 (13m), examine and assess the statutes under which the head has power; or regulatory responsibilities, the procedures by which those statutes are administered and the rules promulgated under those statutes. **If** the department or agency head finds any such discrimination, he or she shall take remedial action, including making recommendations to the appropriate executive, legislative *or* administrative authority.

(i) ***Records*** *and* ***forms management*** *program.* Establish and maintain a records and forms management program.

(j) ***Records*** *and* ***forms*** *officer.* Appoint a records and forms officer, who shall he responsible for compliance by the department or independent agency with all records and farms management laws and rules and who may prevent any form from being put into **use.**

(k) ***Form numbering*** *and filing* ***system.*** Establish **a** numbering and filing system far forms.

(m) *Notice* ***onforms.*** ***See*** that each form used by the department or independent agency to **seek** information from municipalities, counties or the public contains on **the** first page of the form, or in the instructions **for** completing the form, **a** conspicuous notice **of** the authorization for the form, whether or not completing the form is voluntary, if it is not voluntary, the penalty for failure to respond and whether or not any personally identifiable information, **as** defined under s. **19.62** (5), requested in the form is likely to be used for purposes other than for which it is originally being collected. This paragraph does not apply ***to*** state tax forms.

(2) DEPUTY. Each secretary **of** a department or head of **an** independent agency under s. 230.08 **(2)** (L) may appoint a deputy who shall serve at the pleasure of the secretary or agency head outside the classified service. The deputy shall exercise the power;, duties and functions of the secretary or head in the absence of the secretaly or head, and shall perform such other duties as the secretary or head prescribes. The adjutant general may appoint *2* deputies as provided in s. **21.18** (1). **In** this subsection "secretary" includes the attorney general and the state superintendent of public instruction.

(3) DEPUTY APPROVALS. Positions for which appointment is made under sub. *(2)* may be authorized only under **s. 16.505.**

History: 1971 c. 125; **1975c.94:** 1977 c. **196,273,418,447;** 1979 c. 221; **1981** c. 112, 350; **1981** c. 391 s. 210; 1983 a. 27, 524; 1985 a. 29; 1985 a. 180 ss. 2 to 4, 30m; **1985a.332:** 1987 a. 147 s. 25; 1987 a. 186; 1989 a. 248; 1991 a. 39, 189; 1995 a. 27; **1997a.73.**

15.05 Secretaries.(1) SELECTION. (a) **If** a department is under the direction and supervision of a secretary, the secretaly shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor.

(b) Except **as** provided in pars.(c) and (d), if a department is under the direction and supervision of a board, the hoard shall appoint a secretary to serve at the pleasure of the board outside the classified service. In such departments, the powers and duties of the board shall hc regulatory, advisory and policy–making, and not administrative. **All** of the administrative powers and duties of the department are vested in the secretary, to be administered hy him or her under the direction of the board. The secretary, with the approval of the hoard, shall promulgate rules for administering the department and performing the duties assigned to the department.

(c) The secretary of natural resources shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor.

(d) The secretary of agriculture, trade and consumer protection shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor.

(3) EXECUTIVE **ASSISTANT.** Each secretary may appoint an executive assistant to serve at his or her pleasure outside the classified service. The executive assistant shall perform duties **as** the secretary prescribes. In this subsection, "secretary" includes the attorney general, the adjutant general, the director of the technical college system and the state superintendent of public instruction.

(3m) FIELD **DISTRICT** OR **FIELD AREA DIRECTORS.** Each secretary may appoint a director under the classified service for each district or area office established in his or her department under s.15.02 (3) (b).

(4) OFFICIAL OATH. Each secretary shall take and file the official oath prior to assuming ofiice.

(5) EXECUTIVE **ASSISTANT APPROVALS.** Positions for which appointment is made under sub. (3) may be authorized only under s. 16.505.

History: 1973 c. 90; 1977 c. 4, 196; 1985 a. 18; 1985 a. 332 s. 251 (3); **1989s.31,** 169; **1993 a.399: 1995 a 27.**

A secretary, appointed by the governor, could be removed only by the governor, even though the general appointment statute had been amended to provide that the secretary is appointed by a board to serve at the board's pleasure. Mores v. Board **of** Veterans Affairs, 80 Wis. 2d 411, 259 N.W.2d 102 (1977).

15.06 Commissions and commissioners.(1) SELECTION OF MEMBERS.(a) Except as otherwise provided in this subsection, the members of commissions shall be nominated by the governor, and with the advice and consent of the senate appointed, for staggered 6–year terms expiring on March 1 of the odd–numbered years.

(ag) Members of the Wisconsin waterways commission shall be nominated by the governor, and with the advice and consent of the senate appointed, for staggered 5–year terms.

(ar) The commissioner of railroads shall be nominated by the governor, and with the advice and consent of the senate appointed, for a 6–year term expiring on March 1 of an odd–numbered year.

(b) The commissioner of insurance shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor. The governor may remove from office the commissioner of insurance who was appointed for a fixed term before August 1, 1987.

(d) The members of the personnel commission shall be nominated by the governor, and with the advice and consent of the senate appointed, for 5–year terms, subject to the following conditions:

1. At least one member shall be licensed to practice law in this state.

2. They shall possess some professional experience in the field of personnel or labor relations.

3. No member may hold any other position in state employment.

4. No member, when appointed or for 3 years immediately prior to the date of appointment, may have been an officer of a committee in any political party, partisan political club or partisan political organization or have held or been a candidate for any partisan elective public office. No member may become a candidate for or hold any such office.

5. At no time may more than 2 members be adherents of the same political party.

6. Each member of the commission shall be a U.S. citizen and shall have been a resident of this state for at least 3 years.

(2) SELECTION OF OFFICERS. Each commission may annually elect officers other than a chairperson from among its members as its work requires. Any officer may be reappointed or reelected. At the time of making new nominations to commissions, the governor shall designate a member or nominee of each commission to serve as the commission's chairperson for a 2–year term expiring on March 1 of the odd–numbered year except that:

(a) Commencing March 1, 1979, and thereafter, the labor and industry review commission shall elect one of its members to serve as the commission's chairperson for a 2–year term expiring on March 1 of the odd–numbered year.

(3) FULL–TIME OFFICES.(a) A commissioner may not hold any other office or position of profit or pursue any other business or vocation, but shall devote his or her entire time to the duties of his or her office. This paragraph does not apply to: 1. The commissioner of insurance. 3. The members of the Wisconsin waterways commission.

(b) The commissioner of insurance shall not engage in any other occupation, business or activity that is in any way inconsistent with the performance of the duties of the commissioner of insurance, nor shall the commissioner hold any other public office.

(4) CHAIRPERSON; ADMINISTRATIVE DUTIES. The administrative duties of each commission shall be vested in its chairperson, to be administered by the chairperson under the statutes and rules of the

commission and subject to the policies established by the commission.

(4m) EXECUTIVE ASSISTANT. Each commission chairperson under s. 230.08 (2) (m) and each commissioner of the public service commission may appoint an executive assistant to serve at his or her pleasure outside the classified service. The executive assistant shall perform duties as the chairperson or commissioner prescribes.

(5) FREQUENCY OF MEETINGS: PLACE. Every commission shall meet on the call of the chairperson or a majority of its members. Every commission shall maintain its offices in Madison, but may meet or hold hearings at such other locations as will best serve the citizens of this state.

(6) QUORUM. A majority of the membership of **a** cornmission constitutes a quorum to do business, except that vacancies shall not prevent a commission from doing business. This subsection does not apply to the parole commission.

(7) REPORTS. Every commission attached to **a** department shall submit to the head of the department, upon request of that person not more often than annually, **a** report on the operation of the commission.

(8) OFFICIAL **OATH.** Every commissioner shall take and file the official oath prior to assuming office.

(9) EXECUTIVE ASSISTANT APPROVALS. Positions for which appointment is made under sub. **(4m)** may be authorized only under s. 16.505.

History: 1971 c. **193,307;** 1977 c. 29, **196,274:** 1981 c. 347; 1983 a. 27, 371, 410, 538: **1985 a. 29; 1987 a.** 27, 403; 1989 **a.** 31; **1991** a. 39, 269, 316; **1993** a. 16, **123;** 1993 a. 27; 1997 a. 27; 2001 a. 16.

A single member of the personnel commission is empowered to act as the commission when 2 of the 3 commission positions are vacant. 68 Atty. Gen. 323.

A commissioner designated as chairperson of the commission under sub. (2) is not appointed to a new position, and Art. IV, s. 26, precludes a salary increase based on that designation. 76 Atty. Gen. 52.

Sub. (3) (a) prohibits **a commissioner** from pursuing business interests that would prevent properly fulfilling the duties of the office. 77 Atty. Gen. **36.**

15.07 Boards. (1) SELECTION OF MEMBERS. (a) If **a** department or independent agency is under the direction and supervision of a board, the members of the board, other than the members serving on the board because of holding another office or position, shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve for terms prescribed by law, except:

1. Members of the higher educational aids board shall be appointed by the governor without senate confirmation.

2. Members of the elections board shall be appointed **as** provided ins.15.61.

3. Members of the employee trust funds board appointed or elected under s.15.16 (1) **(a),** (b), (d) and (f) shall be appointed or elected **as** provided in that section.

4. Members of the investment hoard appointed under s.15.76 (3) shall be appointed as provided in that section.

5. The members of the educational communications board appointed under s.15.57 (5) and (7) shall be appointed as provided in that section.

6. Members of the University of Wisconsin Hospitals and Clinics Board appointed under s.15.96 (8) shall he appointed by the governor wiihout senate confirmation.

(b) For each hoard not covered under par. (a), the governor shall appoint the members of the board, other than the members serving on the board because of holding another office or position and except as otherwise provided, for terms prescribed by law except that all members of the following hoards, or all members of the following boards specified in this paragraph, other than the members serving on **a** board because of holding another office or position, shall he nominated by the governor, and with the advice and consent of the senate appointed, for terms provided by law:

1. Banking review board.
2. College savings program board.
3. Credit union review board.
5. Savings and loan review board.
8. Real estate board.
9. Board on aging and long–term **care.**
10. Land and water conservation hoard.
11. Waste facility siting hoard.
12. Prison industries hoard.
14. Deferred compensation board.
15. The 3 members of the lower Wisconsin state riverway hoard appointed under s.15.445 (3) (b) 7.
15m. The members of the state fair park board appointed under s.15.445 (4) (a) 3. to 5.
16. Land information board.

Note: Subd. 16. is repealed eff. 9–1–03 by 1997 **Wis. Act** 27.

17. Real estate appraisers hoard.
18. Savings hank review hoard.
19m. Auctioneer hoard.
20. The 3 members of the Kickapoo reserve management hoard appointed under s.15.445 (2) (b) 3.
22. Private employer health care coverage hoard.

Note: Subd. 22. is repealed eff. 1–1–10 by 1999 Wir. Act *9.*

(c) Except as provided under par. (cm), fixed terms of members of hoards shall expire on May 1 and, if the term is for an **even** number of years, shall expire in an odd–numbered year.

(cm) The term of one member of the ethics board shall expire on each May 1. The terms of 3 members of the development finance hoard appointed under s.15.155 (1) (a) 6. shall expire on May 1 of every even–numbered year and the terms of the other 3 members appointed under s.15.155 (1) (a) 6. shall expire on May 1 of every odd–numbered year. The terms of the 3 members of the land and water conservation hoard appointed under s.15.135 (4) (b) **2.** shall expire on January 1. The term of the member of the land and water conservation board appointed under s.15.135 (4) (b) **2m.** shall expire on May 1 of **an** even–numbered year. The terms of members of the real estate board shall expire on July 1. The terms of the appraiser members of the real estate appraisers hoard and the terms of the auctioneer and auction company representative members of the auctioneer board shall expire on May 1 in **an** even–numbered year.

(cs) No member of the auctioneer board, real estate appraisers board or real estate board may be an officer, director or employee of a private organization that promotes or furthers any profession or occupation regulated by that board.

(2) SELECTION OF OFFICERS. At its first meeting in each year, every hoard shall elect a chairperson, vice chairperson and secretary each of whom may be reelected for successive terms, except that:

(a) The chairperson and vice chairperson of the investment board shall he designated biennially by the governor.

(b) The chairperson of the board on health **care** information shall he designated biennially by the governor.

(d) The officers elected by the board **of** regents of the University of Wisconsin System and the technical college system board shall he known as a president, vice president and secretary.

(e) The representative of the department of justice shall serve **as** chairperson of the claims board and the representative of the department of administration shall serve **as** its secretary.

(f) The state superintendent of public instruction or his or her designated representative shall serve **as** chairperson of the school district boundary appeal hoard.

(g) A representative of the department of justice designated by the attorney general shall serve as nonvoting secretary to the law enforcement standards hoard.

(h) The chairperson of the state fair park hoard shall be designated annually by the governor from among the members appointed under s.15.445 (4) **(a)** 3., 4. and 5.

(j) At its first meeting in each even–numbered year, the state capitol and executive residence board shall elect officers for 2–year terms.

(k) The governor shall serve as chairperson of the governor's work–based learning board.

(L) The governor shall serve as chairperson of the information technology management board and the chief information **officer** shall serve as secretary of that hoard.

(3) FREQUENCY OF MEETINGS. (a) If a department or independent agency is under the direction and supervision of a board, the hoard shall meet quarterly and may meet at other times on the call of the chairperson or **a** majority of its members. if **a** department or independent agency is under the direction and supervision of a hoard. the hoard shall, in addition, meet no later than August 31 of each even–numbered year to consider and approve a proposed budget of the department **or** independent agency for the succeeding fiscal biennium.

(b) Except as provided in par. (hm), each board not covered under par. **(a)** shall meet annually, and may meet at other times on the call of the chairperson or **a** majority of its members. The auctioneer board, the real estate board and the **real** estate

appraisers board shall also meet on the call of the secretary of regulation and licensing or his or her designee within the department.

(bm) 1. The board on health care information shall meet 4 times each year and may meet at other times on the call of the chairperson or a majority of the board's members.

2. The environmental education board shall meet 4 times each year and may meet at other times on the call of the chairperson.

3. The auctioneer board shall meet at least 4 times each year.

4. The information technology management board shall meet at least 4 times each year and may meet at other times on the call of the chairperson.

(4) QUORUM. A majority of the membership of a board constitutes a quorum to do business and, unless a more restrictive provision is adopted by the board, a majority of a quorum may act in any matter within the jurisdiction of the board. This subsection does not apply to actions of the ethics board or the school district boundary appeal board as provided in ss. 19.47 (4) and 117.05 (2) (a).

(5) REIMBURSEMENT FOR EXPENSES: COMPENSATION. Except as provided in sub. (5m), the members of each board shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties, such reimbursement in the case of an officer or employee of this state who represents an agency as a member of a board to be paid by the agency which pays the member's salary. The members shall receive no compensation for their services, except that the following members of boards, except full–time state officers or employees, also shall be paid the per diem stated below for each day on which they were actually and necessarily engaged in the performance of their duties:

(a) Members of the investment board, $50 per day.

(b) Members of the banking review board, $25 per day but not to exceed $1,500 per year.

(c) Members of the auctioneer board, $25 per day.

(d) Members of the board of agriculture, trade and consumer protection, not exceeding $35 per day as fixed by the board with the approval of the governor, but not to exceed $1,000 per year.

(e) In lieu of a per diem, the members of the technical college system board shall receive $100 annually.

(f) Members of the teachers retirement board, appointive members of the Wisconsin retirement board, appointive members of the group insurance board, members of the deferred compensation board and members of the employee trust funds board, $25 per day.

(g) Members of the savings and loan review board, $10 per day.

(gm) Members of the savings bank review board, $10 per day.

(h) Voting members of the land and water conservation board, $25 per day.

(i) Members of the educational approval board, $25 per day.

(j) Members of the state fair park board, $10 per day but not to exceed $600 per year.

(k) Members of the ethics board, $25 per day.

(L) Members of the school district boundary appeal board, $25 per day.

(n) Members of the elections board, $25 per day.

(o) Members of the burial sites preservation board, $25 per day.

(r) Members of the real estate board, $25 per day.

(s) Members of the credit union review board, $25 per day but not to exceed $1,500 per year.

(t) Members of the waste facility siting board who are town or county officials, $35 per day.

(w) Members of the lower Wisconsin state riverway board, $25 per day.

(x) Members of the real estate appraisers board, $25 per day.

(y) Members of the Kickapoo reserve management board, $25 per day.

(5m) LIMITATIONS ON SALARY AND EXPENSES. (b) *Lower Wisconsin state riverway board.* The members, except for the chairperson, of the lower Wisconsin state riverway board shall be reimbursed under sub. (5) for only their necessary and actual travel expenses incurred in the performance of their duties, or shall be paid $25 plus mileage incurred in the performance of their duties, whichever is greater. The chairperson of the lower Wisconsin state riverway board shall be reimbursed for all his or her actual and necessary expenses incurred in the performance of his or her duties. The lower Wisconsin state riverway board shall determine which expenses of the chairperson are actual and necessary before reimbursement.

(6) REPORTS. Every board created in or attached to a department or independent agency shall submit to the head of the department or independent agency, upon request of that person not more often than annually, a report on the operation of the board.

(7) OFFICIAL OATH. Each member of a board shall take and file the official oath prior to assuming office.

History: 1971 c. 100 s. 23; 1971 c. 125, 261, 270, 323; 1973 c. 90, 156, 299, 334; 1975 c. 39, 41, 422; 1977 c. 29 ss. 24, 26, 1650m (3); 1977 c. 203, 277, 418, 427; 1979 c. 34, 110, 221, 346; 1981 c. 20, 62, 94, 96, 156, 314, 346, 374, 391; 1983 a. 27, 282, 403; 1985 a. 20, 29, 316; 1987 a. 27, 119, 142, 354, 399, 403; 1989 a. 31, 102, 114, 219, 299, 340; 1991 a. 25, 39, 116, 221, 269, 316; 1993 a. 16, 75, 102, 184, 349, 399, 490; 1995 a. 27, 216, 247; 1997 a. 27; 1999 a. 9, 44, 181, 197; 2001 a. 16.

"Membership" as used in sub. (4) means the authorized number of positions and not the number of positions that are currently occupied. *66* Atty. Gen. 192.

15.08 Examining boards and councils.(1) SELECTION OF MEMBERS. All members of examining boards shall be residents of this state and shall, unless otherwise provided by law, be nominated by the governor, and with the advice and consent of the senate appointed. Appointments shall be for the terms provided by law. Terms shall expire on July 1. No member may serve more than 2 consecutive terms. No member of an examining board may be an officer, director or employee of a private organization which promotes or furthers the profession or occupation regulated by that board,

(1m) PUBLIC MEMBERS. (a) Public members appointed under s. 15.105 or 15.407 shall have all the powers and duties of other members except they shall not prepare questions for or grade any licensing examinations.

(am) Public members appointed under s. 15.405 or 15.407 shall not be, nor ever have been, licensed, certified, registered or engaged in any profession or occupation licensed or otherwise regulated by the board, examining board or examining council to which they are appointed, shall not be married to any person so licensed, certified, registered or engaged, and shall not employ, be employed by or be professionally associated with any person so licensed, certified, registered or engaged.

(b) The public members of the chiropractic examining board, the dentistry examining board, the hearing and speech examining board, the medical examining board, perfusionists examining council, respiratory care practitioners examining council and council on physician assistants, the board of nursing, the nursing home administrator examining board, the veterinary examining board, the optometry examining board, the pharmacy examining board, the marriage and family therapy, professional counseling, and social work examining board, and the psychology examining board shall not be engaged in any profession or occupation concerned with the delivery of physical or mental health care.

(c) The membership of each examining board and examining council created in the department of regulation and licensing after June 1, 1975, shall be increased by one member who shall be a public member appointed to serve for the same term served by the other members of such examining board or examining council, unless the act relating to the creation of such examining board or examining council provides that 2 or more public members shall be appninted to such examining board or examining council.

(2) SELECTION OF OFFICERS. At its first meeting in each year, every examining board shall elect from among its members a chairperson, vice chairperson and, unless otherwise provided by law, a secretary. Any officer may be reelected to succeed himself or herself.

(3) FREQUENCY OF MEETINGS. (a) Every examining board shall meet annually and may meet at other times on the call of the chairperson or of a majority of its members.

(b) The medical examining board shall meet at least 12 times annually.

(c) The hearing and speech examining board shall meet at least once every 3 months.

(4) QUORUM. (a) A majority of the membership of an examining board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the examining board.

(b) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two–thirds of the voting membership of the examining board

(5) GENERAL POWERS Each examining board: (a) May compel the attendance of witnesses, administer oaths, take testimony and receive proof concerning all matters within its jurisdiction.

(b) Shall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.

(c) May limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the examining board.

(6) IMPROVEMENT OF THE PROFESSION. In addition to any other duties vested in it by law, each examining board shall foster the standards of education or training pertaining to its own trade or profession, not only in relation of the trade or profession to the interest of the individual or to organized business enterprise, hut also in relation to government and to the general welfare. Each examining hoard shall endeavor, both within and outside its own trade or profession, to bring about a better understanding of the relationship of the particular trade or profession to the general welfare of this state.

(7) COMPENSATION AND REIMBURSEMENT FOR EXPENSES. Each member of an examining hoard shall, unless the member is a full–time salaried employee of this state, he paid a per diem of $25 for each day on which the member was actually and necessarily engaged in the performance of examining hoard duties. Each member of an examining board shall he reimbursed for the actual and necessary expenses incurred in the performance of examining hoard duties.

(8) OFFICIAL OATH. Every member of an examining hoard shall take and file the official oath prior to assuming office.

(9) ANNUAL REPORTS. Every examining board shall submit to the head of the department in which it is created, upon request of that person not more often than annually, a report on the operation of the examining board.

(10) SEAL. Every examining board may adopt a seal.

History: 1971 c. 40; 1975 c. 86, 199; 1977 c. 418; 1979 c. 32; 1979 c. 34 ss. 32e to 32s, 2102 (45) (a); 1979 c. 221; 1981 c. 94; 1983 a. 403, 524; 1985 a. 332, 340; 1987 a. 399; 1989 a. 229, 316, 359; 1991 a. 39, 160, 316; 1993 a. 105, 107, 184, 490; 1995 a. 245; 1997 a. 175; 1999 a. 180; 2001 a. 80, 89, 105. Selection and terms of officers of regulatory and licensing boards are discussed. 75 Atty. Gen. 247 (1986).

15.085 Affiliated credentialing boards.(1) SELECTION OF MEMBERS. **All** members of affiliated ciedentialing hoards shall he residents of this state and shall, unless otherwise provided by law, he nominated by the governor, and with the advice and consent of the senate appointed. Appointments shall he for the terms provided by law. Terms shall expire on July 1. No member may serve more than 2 consecutive terms. No member of an affiliated credentialing hoard may he **an** officer, director or employee of a private organization which promotes or furthers the profession or occupation regulated by that hoard.

(1m) PUBLIC MEMBERS.(a) Public members appointed under s.15.406 shall have all of the powers and duties of other members except that they shall not prepare questions for or grade any licensing examinations.

(am) Public members appointed under s.15.406 shall not he, **nor ever** have been, licensed, certified, registered or engaged in any profession or occupation licensed or otherwise regulated by the affiliated credentialing hoard to which they **are** appointed, shall not he married to any person so licensed, certified, registered or engaged, and shall not employ, he employed by **or** he professionally associated with any person so licensed, certified, registered or engaged.

(h) The, public members of the physical therapists affiliated credentialing hoard, podiatrists affiliated credentialing hoard **or** occupational therapists affiliated credentialing hoard shall not he engaged in any profession or occupation concerned with the delivery ofphysical or mental health care.

(2) SELECTION OF OFFICERS. At its first meeting in each year, **every** affiliated ciedentialing hoard shall elect from among its members a chairperson, vice chairperson and, unless otherwise provided by law, a secretary. **Any** officer may he reelected to succeed himself or herself.

(3) FREQUENCY OF MEETINGS.(a) Every affiliated credentialing hoard shall meet annually and may meet at other times on the call of the chairperson or of a majority of its members.

(b) The chairperson of an affiliated credentialing board shall meet at least once every 6 months with the examining board to which the affiliated credentialing hoard is attached to consider all matters of joint interest.

(4) QUORUM. **(a)** A majority of the membership of an affiliated credentialing board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the affiliated credentialing hoard.

(h) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice **a** trade or profession shall he suspended **or** revoked without the affirmative vote of two–thirds of the membership of the affiliated credentialing hoard.

(5) GENERAL POWERS~Each affiliated credentialing hoard: **(a)** May compel the attendance of witnesses, administer oaths, take testimony and receive proof concerning all matters within its jurisdiction.

(h) Shall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession. In addition to any other procedure under ch. 227 relating to the promulgation of rules, when promulgating **a rule,** other than an emergency rule under s. 227.24, an affiliated credentialing hoard shall do all of the following:

1. Submit the proposed rule to the examining hoard to which the affiliated credentialing hoard *is* attached. The proposed rule shall he submitted under this subdivision at least 60 days before the proposed rule is submitted to the legislative council staffunder s. 227.15 (1).

2. Consider any comments on a proposed rule made by the examining hoard to which the affiliated credentialing hoard is attached, if the examining hoard submits the comments to the affiliated credentialing hoard within 30 days after a public hearing on the proposed rule under s. 227.18 or, if no hearing *is* held, within **30** days after the proposed rule is published under s. 227.16 (2) (e).

3. Include, in the report submitted to the legislature under s. 227.19 (2), any **comments** on the proposed rule submitted by the examining hoard under subd. 2. and the affiliated credentialing hoard's **responses** to those comments.

(c) May limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the affiliated credentialing hoard.

(6) IMPROVEMENT OF THE PROFESSION. In addition to any other duties vested in it hy law, each affiliated credentialing hoard shall foster the standards of education or training pertaining to its own trade or profession, not only in relation of the trade or profession to the interest of the individual or to organized business enterprise, hut also in relation to government and to the general welfare. Each affiliated credentialing hoard shall endeavor, both within and outside its own trade or profession, to bring about a better understanding of the relationship of the particular trade or profession to the general welfare of this state.

(7) COMPENSATION AND REIMBURSEMENT FOR EXPENSES. Each member of an affiliated credentialing hoard shall, unless the member is a full–time salaried employee of this state, he paid a per diem of 525 for each day on which the member was actually and necessarily engaged in the performance of affiliated credentialing hoard duties. Each member of an affiliated credentialing hoard shall be reimbursed for the actual and necessary expenses incurred in the performance of affiliated credentialing hoard duties.

(8) OFFICIAL OATH. Every member of an affiliated credentialing board shall take and file the official oath prior to assuming office.

(9) ANNUAL REPORTS. Every affiliated credentialing hoard shall submit to the head of the department in which it is created, upon request of that person not more often than annually, a report on the operation of the affiliated credentialing hoard.

(10) SEAL. Every affiliated credentialing hoard may adopt a seal.

History: 1993 a. 107; 1997 a. 175; 1999 a. 180.

15.09 Councils.(1) SELECTION OF MEMBERS.(a) Unless otherwise provided by law, the governor shall appoint the members of councils for terms prescribed by law. Except as provided in par. (h), fixed terms shall expire on July 1 and shall, if the term is for an even number of years, expire in an odd–numbered year.

(b) The terms of the members of the council on recycling shall expire as specified under s.15.347 (17) (c).

(2) SELECTION OF OFFICERS. Unless otherwise provided by law, at its first meeting in each year every council shall elect a chairperson, vice chairperson and secretary from among its members. Any officer may be reelected for successive terms. For any council created under the general authority of s.15.04 (1) *(c),* the constitutional officer or secretary heading the department or the chief executive officer of the independent agency in which such council is created shall designate an employee of the department or independent agency to serve as secretary of the council and to be a voting member thereof.

(3) LOCATION AND FREQUENCY OF MEETINGS. Unless otherwise provided by law, every council shall meet at least annually and shall also meet on the call of the head of the department or independent agency in which it is created, and may meet at other times on the call of the chairperson or a majority of its members. A council shall meet at such locations as may be determined by it unless the constitutional officer or secretary heading the department or the chief executive officer of the independent agency in which it is created determines a specific meeting place.

(4) QUORUM. Except as otherwise expressly provided, a majority of the membership of a council constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the council.

(5) POWERS AND DUTIES. Unless otherwise provided by law, a council shall advise the head of the depamnent or independent agency in which it is created and shall function on a continuing basis for the study, and recommendation of solutions and policy alternatives, of the problems arising in a specified functional area of state government.

(6) REIMBURSEMENT FOR EXPENSES. Members Of a council shall not be compensated for their services, but members of councils created by statute shall be reimbursed for their actual and necessary expenses incuned in the performance of their duties, such reimbursement in the case of an elective or appointive officer or employee of this state who represents an agency as a member of a council to be paid by the agency which pays his or her salary.

(7) REPORTS. Unless a different provision is made by law for transmittal or publication of a report, every council created in a department or independent agency shall submit to the head of the department or independent agency, upon request of that person not more often than annually, a report on the operation of the council.

(8) OFFICIAL OATH. Each member of a council shall take and file the official oath prior to assuming office.

History: 1971 c. 211; 1977 c. 29; 1977 c. 196 s. 131; 1979 c. 34, 346; 1983 a. 27, 348, 410; 1985 a. 84; 1989 a. 335; 1991 a. 39, 189; 1993 a. 184. 6. One person

15.40 Department of regulation and licensing; creation. There is created a department of regulation and licensing under the direction and supervision of the secretary of regulation and licensing.

History: 1971 c. 270 I. 104; 1975 c. 39; 1977 c. 29; 1977 c. 196 I. 131; 1977 c. 418 ss. 24 to 27.

15.405 Same: attached boards and examining boards.(1) ACCOUNTING EXAMINING BOARD. There is created an accounting examining board in the department of regulation and licensing. The examining board shall consist of 7 members, appointed for staggered 4–year terms. Five members shall hold certificates as certified public accountants and be eligible for licensure to practice in this state. Two members shall be public members.

(2) EXAMINING BOARD OF ARCHITECTS, LANDSCAPE ARCHITECTS, PROFESSIONAL ENGMEERS, DESIGNERS AND LAND SURVEYORS. There is created an examining board of architects, landscape architects, professional engineers, designers and land surveyors in the department of regulation and licensing. Any professional member appointed to the examining hoard shall be registered to practice architecture, landscape architecture, professional engineering, the design of engineering systems or land surveying under ch. 443. The examining board shall consist of the following members appointed for 4–year terms: 3 architects, 3 landscape architects, 3 professional engineers, 3 designers, 3 land surveyors and 10 public members.

(a) In operation, the examining board shall be divided into an architect section, a landscape architect section, an engineer section, a designer section and a land surveyor section. Each section shall consist of the 3 members of the named profession appointed to the examining board and 2 public members appointed to the section. The examining board shall elect its own officers, and shall meet at least twice annually.

(b) All matters pertaining to passing upon the qualifications of applicants far and the granting or revocation of registration, and all other matters of interest to either the architect, landscape architect, engineer, designer or land surveyor section shall he acted upon solely by the interested section.

(c) All matters of joint interest shall he considered by joint meetings of all sections of the examining hoard or of those sections to which the problem is of interest.

(2m) EXAMINING BOARD OF PROFESSIONAL GEOLOGISTS, HYDROLOGISTS AND SOIL SCIENTISTS.(a) There is created in the department of regulation and licensing an examining board of professional geologists, hydrologists and soil scientists consisting of the following members appointed for 4–year terms:

1. Three members who are professional geologists licensed under ch. 470.

2. Three members who are professional hydrologists licensed under ch. 470.

3. Three members who are professional soil scientists licensed under ch. 470.

4. Three public members.

(b) In operation, the examining hoard shall be divided into a professional geologist section, a professional hydrologist section and a professional soil scientist section. Each section shall consist of the 3 members of the named profession appointed to the examining board and one public member appointed to the section. The examining board shall elect its own officers, and shall meet at least twice annually.

(c) All matters pertaining to passing upon the qualifications of applicants for and the granting or revocation of licenses, and all other matters of interest to either the professional geologist, hydrologist or soil scientist section shall be acted upon solely by the interested section.

(d) All matters of joint interest shall be considered by joint meetings of all sections of the examining board or of those sections to which the matter is of interest.

(3) AUCTIONEER BOARD. (a) There is created in the department of regulation and licensing an auctioneer board consisting of the following members appointed for 4–year terms:

1. Four members, each of whom is registered under ch. 480 as an auctioneer, or is an auction company representative, as defined ins. 480.01 (3), of an auction company that is registered under ch. 480 as an auction company.

2. Three public members.

(b) No member of the board may serve more than 2 terms.

(5) CHIROPRACTIC EXAMINING BOARD. There is created a chiropractic examining board in the depamnent of regulation and licensing. The chiropractic examining hoard shall consist of *6* members, appointed for staggered 4–year terms. Four members shall be graduates from a school of chiropractic and licensed to practice chiropractic in this state. Two members shall be public members. No person may be appointed to the examining board who is in any way connected with or has a financial interest in any chiropractic school.

(5g) CONTROLLED SUBSTANCES BOARD There is created in the department of regulation and licensing a controlled substances board consisting of the attorney general, the secretary of health and family services and the secretary of agriculture, trade and consumer protection, or their designees; the chairperson of the pharmacy examining board or a designee; and one psychiatrist and one pharmacologist appointed for 3–year terms.

(6) DENTISTRY EXAMINING BOARD. There is created a dentistry examining board in the department of regulation and licensing consisting of the following members appointed for &year terms:

(a) Six dentists who are licensed under ch. 447.

Note: Par. **(a) is shorn as repealed and recreated off. 12–31–02 by 2001 Wir. Act 16. Prior to 12–31–02 if reads: (a) Six dentists who are licensed under ch. 441.**

(b) Three dental hygienists who are licensed under ch. 447. Notwithstanding s.15.08 (Im) (a), the dental hygienist members may pamcipate in the preparation and grading of licensing examinations for dental hygienists.

Note: Par. (b) is shorn as repealed and recreated eff. 12–31–02 by 2001 Wis. Act 16. Prior to 12–31–02if reads:

(h) Three dental hygienists rho are licensed under ch. 441. Notwithstanding s.15.08 (1m) (a), the dental hygienist members may participate in the preparation **and grading** of licensing **examinations** *for* **dental hygienists.**

(c) Two public members.

(6m) HEARING AND SPEECH EXAMINING BOARD. There is created **a** hearing and speech examining board in the department of regulation and licensing consisting of the following members appointed for 4–year terms:

(a) Three hearing instrument specialists licensed under subch. I of ch. 459.

(b) One otolaryngologist.

(c) 1. One audiologist registered under subch. III of ch. 459. This subdivision applies during the period beginning on December 1, 1990, and ending on June 30, 1993.

2. **One** audiologist licensed under subch. II of ch. 459. This subdivision applies after **June** 30, 1993.

(d) 1. One speech–language pathologist registered under subch. III of ch. 459. This subdivision applies during the period beginning on December 1, 1990, and ending on June 30, 1993.

2. One speech-language pathologist licensed under subch. II of ch. 459. This subdivision applies after June 30, 1993.

(e) Two public members. One of the public members shall be a hearing aid user.

(7) MEDICAL EXAMINING HOARD. (a) There is created **a** medical examining board in the department of regulation and licensing.

(b) The medical examining board shall consist of the following members appointed for staggered 4–year terms:

1. Nine licensed doctors of medicine.\

2. One licensed doctor of osteopathy.

3. Three public members.

(c) The chairperson of the patients compensation fund peer review **council** under s. 655.275 shall serve as **a** nonvoting member of the medical examining board.

(7c) MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD. (a) There is created a marriage and family therapy, professional counseling, and social work examining board in the department of regulation and licensing consisting of the following members appointed for 4–year terms:

1. Four social worker members who are certified or licensed under ch. 457.

2. Three marriage and family *therapist* members who **are** licensed under ch. 457.

3. Three professional counselor members who are licensed under ch. 457.

4. Three public members who represent groups that promote the interests of consumers of services provided by persons who are certified or licensed under ch. 457.

(am) The 4 members appointed under par. (a) 1. shall consist of the following:

1. **One** member who is certified under ch. 457 as an advanced practice social worker.

2. **One** member who is certified under ch. 457 as an independent social worker.

3. One member who is licensed under ch. 457 as a clinical social worker.

4. **At** least one member who is employed as a social worker by a federal, state or local governmental agency.

(b) In operation, the examining board shall be divided into a social worker section, **a** marriage and family therapist section and a professional counselor section. The social worker section shall consist of the 4 social worker members of the examining board and one of the public members of the examining hoard. The marriage and family therapist section shall consist of the 3 marriage and family therapist members of the examining board and one of the public members of the examining board. The professional counselor section shall consist of the 3 professional counselor members of the examining board and one of the public members of the examining board.

(c) **All** matters pertaining ***to*** granting, denying, limiting, suspending, or revoking a certificate or license under ch. 457, and all other matters of interest to either the social worker, marriage and family therapist, or professional counselor section shall he acted upon solely hy the interested section of the examining board.

(d) All matters that the examining board determines are of joint interest shall be considered by joint meetings of all sections of the examining board or of those sections to which the problem is of interest.

(e) Notwithstanding s.15.08 (4) (a), at a joint meeting of all sections of the examining hoard, a majority of the examining board *constitutes* a quorum to do business only if at least 8 members are present at the meeting. At a meeting of a section of the examining board or a joint meeting of 2 or more of the sections of the examining board, each member who is present has one vote; except as provided in par. (f).

(f) ***At*** a joint meeting of the social worker section and one or both of the other sections of the examining board, each member who is present has one **vote,** except that the social worker members each have three–fourths of a vote if all 4 of those members are present.

(79) BOARD OF NURSWG. There is created **a** board of nursing in the department of regulation and licensing. The board of nursing shall consist of the following members appointed for staggered 4–year terms: 5 currently licensed registered **nurses** under ch. 441; 2 currently licensed practical nurses under ch. 441; and 2 public members. Each registered nurse member shall have graduated from a program in professional nursing and each practical nurse member shall have graduated from a program in practical nursing accredited by the state in which the program was conducted.

(7m) NURSING HOME ADMINISTRATOR EXAMINING BOARD. There is created a nursing home administrator examining board in the department of regulation and licensing consisting of 9 members appointed for staggered 4–year terms and the secretary of health and family services or a designee, who shall serve as **a** nonvoting member. **Five** members shall be nursing home administrators licensed in this state. One member shall be a physician. **One** member shall be a nurse licensed under ch. 441. Two members shall he public members. No more than 2 members may be officials or full–time employees of this state.

(8) OPTOMETRY EXAMINING BOARD. There is created an optometry examining board in the department of regulation and licensing. The optomeny examining board shall consist of 7 members appointed for staggered &year terns. Five of the members shall be licensed optometrists in this state. Two members shall he public members.

(9) PHARMACY EXAMINING BOARD. There is created a pharmacy examining board in the department of regulation and licensing. The pharmacy examining board shall consist of 7 members appointed for staggered 4–year terms. **Five** of the members shall be licensed to practice pharmacy in this state. Two members shall be public members.

(10m) PSYCHOLOGY EXAMINING BOARD. There is created in the department of regulation and licensing a psychology examining board consisting of ***6*** members appointed for staggered &year terms. Four of the members shall be psychologists licensed in this state. Each of the psychologist members shall represent a different specialty area within the field of psychology. Two members shall be public members

(10r) REAL ESTATE APPRAISERS BOARD. (a) There is created a real estate appraisers board in the department of regulation and licensing consisting of the following members appointed for 4–year terms:

1. Three appraisers who are certified or licensed under ch. 458.

2. One assessor, **as** defined ins. 458.09 (1).

3. Three public members

(b) **Of** the appraiser members of the board, one shall be certified under s. 458.06 **as a** general appraiser, one shall be certified under s. 458.06 **as** a residential appraiser and one shall be licensed under s. 458.08 as an appraiser. No public member of the board may be connected with or have any financial interest in an appraisal business or in any other real estate–related business. Section 5.08 (1m) (am) applies to the public members of the board. No member of the **board** may serve more than 2 consecutive terns.

(c) Notwithstanding s.15.07 (4), a majority of the board constitutes **a** quorum to do business only if at least 2 of the members present are appraiser members and at least one of the members present is a public member.

(11) REAL ESTATE BOARD. There is created **a** real estate board in the department of regulation and licensing. The real estate board shall consist of 7 members appointed to staggered 4–year terms. Four of the members shall he real estate broken or salespersons licensed in this state. Three members shall be public members. Section 15.08(1m) (am) applies to the public members of the real estate board. No member may serve more than 2 terns. The real estate hoard does not have rule–making authority.

(12) VETERINARY EXAMINING HOARD. There is created a veterinary examining board in the department of regulation and licensing. The veterinary examining board shall consist of 8

members appointed for staggered 4–year terms. Five of the members shall be licensed veterinarians in this state. One member shall be a veterinary technician certified in this state. Two members shall be public members. No member of the examining board may in any way be financially interested in any school having **a** veterinary department or a course of study in veterinary or animal technology.

(16) FUNERAL DIRECTORS EXAMINING BOARD. There is created a funeral directors examining board in the department of regulation and licensing. The funeral directors examining board shall consist of *6* members appointed for staggered 4–year terms. Four members shall he licensed funeral directors under ch. 445 in this state. Two members shall be public members.

(17) BARBERING AND COSMETOLOGY EXAMINMG BOARD. There is created a barhering and cosmetology examining board in the department of regulation and licensing. The barhering and cosmetology examining hoard shall consist of 9 members appointed for 4–year terms. Four members shall be licensed barbers or cosmetologists, 2 members shall **he** public members, one member shall be a representative of a private school of barbering or cosmetology, one member shall be a representative **of** a public school of barbering or cosmetology and **one** member shall be **a** licensed electrologist. Except for the 2 members representing schools, no member may be connected with or have any financial interest in a barhering or cosmetology school.

History: 1973 c. 90, 156; 1975 c. 39, 86, 199, 200, 383, 422; 1977 c. 26, 29, 203; 1977c.418; 1979 c. 34 ss. 45, 47 to 52; 1979 c. 221, 304; 1981 c. 94 ss. 5, 9; 1981 c. 356; 1983 a. 27,403,485,538; 1985 a. 340; 1987 a. 257 s. 2; 1987 a. 264, 265, 316; 1989 a. 316, 340; 1991 a. 39, 78, 160, 189, 269; 1993 a. 16, 102, 463, 465, 491; 1995 a. 27 a. 9126 (19); 1995a.225: 1995 a. 305 s. 1; 1995 a. 321, 417; 1997 a. 96, 252, 300: 2001 a. 16, 80.

A medical school instructor serving without compensation is ineligible to serve on the board of medical examiners. 62 Atty. Gen. 193.

An incumbent real estate examining board member is entitled to hold over in office until a successor is duly appointed and confirmed by the senate. The board was without authority to reimburse the nominee for expenses incurred in attending a meeting during an orientation period prior to confirmation. 63 Atty. Gen. 192.

15.406 Same; attached affiliated credentialing boards.(1) PHYSICAL THERAPISTS AFFILIATED CREDENTIALING BOARD. There **is** created in the department of regulation and licensing, attached to the medical examining hoard, a physical therapists affiliated credentialing board consisting of the following members appointed for &year terms:

(a) Three physical therapists who are licensed under subch. 111 of ch. 448.

(am) One physical therapist assistant licensed under subch. III of ch. 448.

Note: Par. (am) is created eff. 4–1–04 by 2001 Wis. Act 70.

(b) One public member.

(2) DIETITIANS AFFILIATED CREDENTIALING BOARD. There is created in the department of regulation and licensing, attached to the medical examining board, **a** dietitians affiliated credentialing board consisting of the following members appointed for 4–year terms:

(a) Three dietitians who are Certified under subch. V of ch. 448.

@)One public member.

(3) PODIATRISTS AFFILIATED CREDENTIALING BOARD. There is created in the department of regulation and licensing, attached to the medical examining board, a podiatrists affiliated credentialing hoard consisting of the following members appointed for 4–year terms:

(a) Three podiatrists who are licensed under suhch. IV of ch. 448.

(h) One public member.

(4) ATHLETIC TRAINERS AFFILIATED CREDENTIALING BOARD. There is created in the department of regulation and licensing, attached to the medical examining board, an athletic trainers affiliated credentialing ***board*** consisting of the following members appointed for 4–year terms:

(a) Four athletic trainers who are licensed under subch. VI of ch. 448 and who have not been issued a credential in athletic training by a governmental authority in a jurisdiction outside this state. One of the athletic trainer members may also be licensed under ch. 446 or 447 or suhch. 11,111 **or** IV of ch. 448.

(b) **One** member who is licensed to practice medicine and surgery under subch. II of ch. 448 and who has experience with athletic training and sports medicine.

(c) One public member.

(5) OCCUPATIONAL THERAPISTS AFFILIATED CREDENTIALING BOARD. There is created in the department of regulation and licensing, attached to the medical examining board, an occupational therapists affiliated credentialing board consisting of the following members appointed for 4–year terms:

(a) Three occupational therapists who are licensed under subch. VII of ch. 448.

(b) Two occupational therapy assistants who are licensed under subch. VI of ch. 448.

(c) Two public members.

History: 1993 a. 107, 443; 1997 a. 75, 175; 1999 a. 9, 180; 2001 a. 70

15.407 Same; councils.(1m) RESPIRATORY CARE PRACTITIONERS EXAMINING COUNCIL. There is created a respiratory care practitioners examining council in the department of regulation and licensing and serving the medical examining board in an advisory capacity in the formulating of rules to he promulgated by the medical examining board for the regulation of respiratory care practitioners, The respiratory care practitioners examining council shall consist of 3 certified respiratory care practitioners, each of whom shall have engaged in the practice of respiratory Care for at least 3 years preceding appointment, one physician and one public member. The respiratory **care** practitioner and physician members shall be appointed by the medical examining board. The members of the examining council shall serve 3–year terms. Section 15.08 (1) to **(4)**(a) and (6) to (10) shall apply to the respiratory care practitioners examining council.

(2) COUNCIL ON PHYSICIAN ASSISTANTS. There **is** created a council on physician assistants in the department of regulation and licensing and serving the medical examining board in an advisory capacity. The council's membership shall consist of:

(a) The vice chancellor for health **sciences** of the University of Wisconsin–Madison or the vice chancellor's designee.

(b) One public member appointed by the governor for a 2–year term.

(c) Three physician assistants selected by the medical examining board for staggered 2–year terms.

(2m) PERFUSIONISTS EXAMINING COUNCIL. There is created a perfusionists examining council in the department of regulation and licensing and serving the medical examining hoard in an advisory capacity, The council shall consist of the following members appointed for 3–year terms:

(a) Three licensed perfusionists appointed by the medical examining board.

(b) **One** physician who is a cardiothoracic surgeon or **a** cardiovascular anesthesiologist and who is appointed by the medical examining board.

(c) **One** public member appointed by the governor.

(3) EXAMINING COUNCILS: BOARD Of NURSING. The following examining councils **are** created in the department of regulation and licensing to serve the board of nursing in an advisory capacity. Section 15.08 (1) to (4) (a) and ***(6)*** to (10), applies to the examining councils.

(a) ***Registered nurses.*** There is created **an** examining council on registered **nurses** to consist of 4 registered nurses of not less than 3 years' experience in nursing, appointed by the board of nursing for staggered 4–year terms.

(b) ***Practical nurses.*** There is created an examining council on licensed practical nurses to consist of one registered nurse, 3 licensed practical nurses and one registered nurse who is a faculty member of an accredited school for practical nurses, appointed by the board of nursing for staggered 3–year terms. No member may be a member of the examining council on registered nurses.

(4) COUNCIL ON SPEECH–LANGUAGE PATHOLOGY AND AUDIOLOGY. There is created a council on speech–language pathology and audiology in the department of regulation and licensing and serving the hearing and speech examining board in an advisory capacity. The council shall consist of the following members appointed for 3–year terms:

(a) Three speech–language pathologists licensed under suhch. II of ch. 459.

(b) Two audiologists licensed under subch. II of ch. 459.

(5) COUNCIL ON REAL ESTATE CURRICULUM AND EXAMINATIONS. There is created in the department of regulation and licensing a council on real estate curriculum and examinations consisting of 7 members appointed for 4–year terms. Five members shall be real

estate brokers or salespersons licensed under ch. 452 and 2 members shall be public members. Of the real estate broker or salesperson members, one member shall be a member of the real estate board appointed by the real estate board, at least 2 members shall be licensed real estate brokers with at least 5 years of experience as real estate brokers, and at least one member shall be a licensed real estate salesperson with at least 2 years of experience as a real estate salesperson. Of the 2 public members, at least one member shall have at least 2 years of experience in planning or presenting real estate educational programs. No member of the council may serve more than 2 consecutive terms.

(6) PHARMACIST ADVISORY COUNCIL. There is created a pharmacist advisory council in the department of regulation and licensing and serving the pharmacy examining board in an advisory capacity. The council shall consist of the following members appointed for 3–year terms:

(a) Two pharmacists licensed under ch. 450 appointed by the chairperson of the pharmacy examining board.

(b) One physician licensed under subch. II of ch. 448 appointed by the chairperson of the medical examining board.

(c) One nurse licensed under ch. 441 appointed by the chairperson of the board of nursing.

(7) MASSAGE THERAPY AND BODYWORK COUNCIL. *(a)* There is created a massage therapy and bodywork council in the department of regulation and licensing, serving the department in an advisory capacity. The council shall consist of 7 members, appointed for 4–year terms, who are massage therapists or bodyworkers certified under ch. 460 and who have engaged in the practice of massage therapy or bodywork for at least 2 years preceding appointment.

(b) In appointing members under par. (a), the governor shall ensure, to the maximum extent practicable, that the membership of the council is diverse, based on all of the following factors:

1. Massage or bodywork therapies practiced in this state.

2. Affiliation and nonaffiliation with a professional association for the practice of massage therapy or bodywork.

3. Professional associations with which massage therapists or bodyworkers in this state are affiliated.

4. Practice in urban and rural areas in this state.

Note: Sub. (7) is created eff. 3–1–03 by 2001 Wis. Act 74.

History: 1973 c. 149; 1975 c. 39, 86, 199, 383, 422; 1977 c. 418; 1979 c. 34 ss. 46, 53; 1981 c. 390 s. 252; 1985 a. 332 s. 251 (1); 1987 a. 399; 1989 a. 229, 316, 341, 359; 1991 a. 316; 1993 a. 105, 107; 1997 a. 68, 175; 1997 a. 237 s. 727m; 1999 a. 32, 180, 186; 2001 a. 74, 89.

CHAPTER 134
MISCELLANEOUS TRADE REGULATIONS

134.57 Detectives, settlement with employees. Any employer and any person employed to detect dishonesty on the part of employees, or fiduciary agents, on a commission basis or under a contract for a percentage of the amount recovered through or by reason of the detective work done by such person, shall submit the facts of the case and the settlement made with such employee or fiduciary agent to the circuit judge of the county wherein the dishonest act was committed, for approval or further proceedings, and the employee shall he notified of such hearing and shall have a right to he heard. Any such person or employer who shall not so submit the facts and settlement as made to such circuit judge for approval or further proceedings, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than $100 nor more than $500, or imprisoned in the county jail not less than 3 months nor more than one year.

134.58 Use of unauthorized persons as officers. Any person who, individually, in concert with another or as agent or officer of any firm, joint–stock company or corporation, uses, employs, aids or assists in employing any body of armed persons to act as militia, police or peace officers for the protection of persons or property or for the suppression of strikes, not being authorized by the laws of this state to so act, is guilty of a Class I felony.

NOTE: This section is shown as amended eff. 2–1–03 by 2001 Wis. Act *109.* **Prior to 2–1–03 it reads: 134.58 Use of unauthorized persons as officers. Any person who, individually, in concert with another or as agent or officer of any firm, joint–stock company or corporation, uses, employs, aids or assists in employing any body of armed persons to act as militia, police or peace officers for the protection of persons or property or for the suppression of strikes, not being authorized by the laws of this state to so act, shall be fined not more than $1,000 or imprisoned for not less than one year nor more than 4 years and 6 months or both.**

History: 1975 c. *94; 1997 a. 283;* 2001 a. 109.

CHAPTER 167
SAFEGUARDS OF PERSONS AND PROPERTY

167.30 Use of firearms, etc., near park, etc. Any person who shall discharge or cause the discharge of any missile from any firearm, slung shot, how and arrow or other weapon, within 40 rods of any public park, square or enclosure owned or controlled by any municipality within this state and resorted to for recreation or pleasure, when such park, square or enclosure is wholly situated without the limits of such municipality, shall he punished by imprisonment in the county jail not exceeding 60 days or by fine of not more than $25 nor less than one dollar.

1S7.31 Safe use and transportation of firearms and bows. **(1) DEFINITIONS.** In this section: (a) "Aircraft" has the meaning given under s. 114.002 (3).

(b) "Encased" means enclosed in a case that is expressly made for the purpose of containing a firearm and that is completely zipped, snapped, buckled, tied or otherwise fastened with no part of the firearm exposed.

(bg) "Family member of the landowner'' means a person who is related to the landowner as a parent, child, spouse, or sibling.

(bn) "Farm tractor" has the meaning given in s. 340.01 (16).

(c) "Firearm" means a weapon that acts hy force of gunpowder.

(d) "Highway" has the meaning given under s. 340.01 (22).

(dm) "Implement of husbandry" has the meaning given in s. 340.01 (24).

(e) "Motorboat" has the meaning given under s. 30.50 (6).

(em) "Peace officer" has the meaning given ins. 939.22 (22).

(f) "Roadway" has the meaning given under s. 340.01 (54).

(fm) "Street" means a highway that is within the corporate limits of a city or village.

(g) "Unloaded" means any of the following:

1. Having no shell or cartridge in the chamber of a firearm or in the magazine attached to a firearm.

2. In the case of a cap lock muzzle–loading firearm, having the cap removed.

3. In the case of a flint lock muzzle–loading firearm, having the flashpan cleaned of powder.

(h) "Vehicle" has the meaning given in s. 340.01 (74), and includes a snowmobile, as defined in s. 340.01 (58a), and an electric personal assistive mobility device, as defined in s. 340.01 (15pm), except that for purposes of subs. (4) (c) and (cg) and (4m) "vehicle" has the meaning given for "motor vehicle'' in s. 29.001 (57).

(2) PROHIBITIONS; MOTORBOATS AND VEHICLES; HIGHWAYS AND ROADWAYS. (a) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on a motorboat with the motor running, unless the firearm is unloaded or unless the bow or crossbow is unstrung or is enclosed in a carrying case.

(b) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on a vehicle, unless the firearm is unloaded and encased or unless the bow or crossbow is unstrung or is enclosed in a carrying case.

(c) Except as provided in sub. (4), no person may load or discharge a firearm or shoot a bolt or an arrow from a bow or crossbow in or from a vehicle.

(d) Except as provided in sub. (4) (a), (bg), (cg), (e), and (g), no person may discharge a firearm or shoot a bolt or an arrow from a bow or crossbow from or across a highway or within 50 feet of the center of a roadway.

(e) A person who violates pars. (a) to (d) is subject to a forfeiture of not more than $100.

(3) PROHIBITIONS; AIRCRAFT (a) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on an aircraft, unless the firearm is unloaded and encased or unless the bow or crossbow is unstrung or is enclosed in a carrying case.

(b) Except as provided in sub. (4), no person may load or discharge a firearm or shoot a bolt or an arrow from a bow or crossbow in or from an aircraft

(c) A person who violates par. (a) or (b) shall be fined not more than $1,000 or imprisoned not more than 90 days or both.

(4) EXCEPTIONS. (a) Subsections (2) and (3) do not apply to any of the following who, in the line of duty, place, possess, transport, load or discharge a firearm in, on or from a vehicle, motorboat or aircraft or discharge a firearm from or across a highway or within 50 feet of the center of a roadway:

2. A member of the U.S. armed forces.

3. A member of the national guard.

4. A private security person, as defined in s. 440.26 (Im), who meets all of the following requirements:

a. He or she holds either a private detective license issued under s. 440.26 (2) (a) 2. or a private security permit issued under s. 440.26 *(5)*.

b. He or she holds a certificate of proficiency to carry a firearm issued by the department of regulation and licensing.

c. He or she is performing his or her assigned duties or responsibilities.

d. He or she is wearing a uniform that clearly identifies him or her as a private security person.

e. His or her firearm is in plain view, as defined by rule by the department of regulation and licensing.

(am) 1. Subsections (2) (a), (c) and (d) and (3) (a) and (b) do not apply to a peace officer who, in the line of duty, loads or discharges a firearm in, on or from a vehicle, motorboat or aircraft or discharges a firearm from or across a highway or within 50 feet of the center of a roadway.

2. Subsection (2) (b) does not apply to a peace officer who places, possesses or transports a firearm in or on a vehicle, motorboat or aircraft while in the line of duty.

3. Subsection (2) @) does not apply to a person employed as a peace officer who places, possesses or transports a firearm in or on a vehicle while traveling in the vehicle from his or her residence to his or her place of employment as a peace officer.

(b) Subsections (2) (a), (b) and (c) and (3) (a) and (b) do not apply to the holder of a scientific research license under s. 169.25 or a scientific collector permit under s. 29.614 who is using a net gun or tranquilizer gun in an activity related to the purpose for which the license or permit was issued.

(bg) 1. Subsection (2) (a), (h), (c), and (d) does not apply to a state employee or agent, or to a federal employee or agent, who is acting within the scope of his or her employment or agency, who is authorized by the department of natural resources to take animals in the wild for the purpose of controlling the spread of disease in animals and who is hunting in an area designated by the department of natural resources as a chronic wasting disease eradication zone, except that this subdivision does not authorize the discharge of a firearm or the shooting of a bolt or arrow from a bow or crossbow across a state trunk highway, county trunk highway, or paved town highway.

1g. Subsection (2) (b) and (c) does not apply to a landowner, a family member of the landowner, or an employee of the landowner who is using a firearm, bow, or crossbow to shoot wild animals from a farm tractor or an implement of husbandry on the landowner's land that is located in an area designated by the department of natural resources as a chronic wasting disease eradication zone.

Im. Subsection (3) (a) and (b) does not apply to a state employee or agent or a federal employee or agent hunting an animal in the wild as authorized under s. 29.307 (2).

2. This paragraph does not apply after June 30, 2004.

(bn) Subsection (2) (a) does not apply to a person using a bow or a crossbow for fishing from a motorboat (c) Subsection (2) (b)

and (c) does not apply to the holder of a Class A or Class B permit under s. 29.193 (2) who is hunting from a stationary vehicle.

(cg) A holder of a Class A or Class B permit under s. 29.193 (2) who is hunting from a stationary vehicle may load and discharge a firearm or shoot a bolt or an arrow within 50 feet of the center of a roadway if all of the following apply:

1. The roddway is part of a county highway, a town highway or any other highway that is not part of a street or of a state trunk or federal highway.

2. The vehicle is located off the roadway and is not in violation of any prohibition or restriction that applies to the parking, stopping or standing of the vehicle under ss. 346.51 to 346.55 or under a regulation enacted under s. 349.06 or 349.13.

3. The holder of the permit is not hunting game to fill the tag of another person.

4. The holder of the permit has obtained permission from any person who is the owner or lessee of private property across or on to which the holder of the permit intends to discharge a firearm or shoot a bolt or an arrow.

5. The vehicle bears special registration plates issued under s. 341.14 (1), (1a), (1e), (1m) or (1r) or displays a sign that is at least 11 inches square on which is conspicuously written "disabled hunter".

6. The holder of the permit discharges the firearm or shoots the bolt or arrow away from and not across or parallel to the roadway.

(cm) For purposes of pars. (c) and (cg), the exemption from sub. (2) (b) under these paragraphs only applies to the firearm, bow or crossbow being used for hunting by the holder of the Class A or Class B permit under s. 29.193 (2).

(co) For purposes of par. (cg), a person may stop a vehicle off the roadway on the left side of the highway.

(cr) For purposes of par. (cg) 4., "private property" does not include property leased for hunting by the public, land that is subject to a contract under subch. I of ch. 77, or land that is subject tn an order designating it as managed forest land under suhch. VI of ch. 77 and that is not designated as closed to the public under s. 77.83 (1).

(d) Subsection (2) (b) does not prohibit a person from leaning an unloaded firearm against a vehicle.

(e) Subsection (2) (d) does not apply to a person who is legally hunting small game with a muzzle-loading firearm or with a shotgun loaded with shotshell or chilled shot number BB or smaller, if the surface of the highway or roadway is anything other than concrete or blacktop.

(f) Subsection (2) (d) does not prohibit a person from possessing a loaded firearm within 50 feet of the center of a roadway if the person does not violate sub. (2) (b) or (c).

(g) A person who is fishing with a bow and arrow may shoot an arrow from a bow within 50 feet of the center of a roadway if the person does not shoot the arrow from the roadway or across a highway.

(4m) RULES. The department of natural resources may further restrict hunting from stationary vehicles on county or town highways by promulgating rules designating certain county and town highways, or portions thereof, upon which a holder of a Class A or Class B permit issued under s. 29.193 (2) may not discharge a firearm or shoot a bolt or an arrow from a bow or crossbow under sub. (4) (cg). For each restriction of hunting from a county or town highway contained in a rule to he promulgated under this subsection, the department shall submit a specific justification for the restriction with the rule submitted to legislative council staff for review under s. 227.15 (1).

(5) WEAPONS ASSESSMENT. (a) If a court imposes a fine or forfeiture for a violation of this section, the court shall also impose a weapons assessment equal to 75% of the amount of the tine or forfeiture.

(b) If a fine or forfeiture is suspended in whole or in part, the weapons assessment shall be reduced in proportion to the suspension.

(c) If any deposit is made for an offense to which this subsection applies, the person making the deposit shall also deposit a sufficient amount to include the weapons assessment under this subsection. If the deposit is forfeited, the amount of the weapons assessment shall be transmitted to the state treasurer under par. (d). If the deposit is returned, the amount of the weapons assessment shall also be returned.

(d) The clerk of the circuit court shall collect and transmit to the county treasurer the weapons assessment as required under s. 59.40 (2) (m). The county treasurer shall then pay the state treasurer as provided in s. 59.25 (3) (f) 2. The state treasurer shall deposit all amounts received under this paragraph in the conservation fund to be appropriated under s. 20.370 (3) (mu).

History: 1985 a. 36; 1987 a. 27, 353; 1991 a. 77; 1993 a. 147; 1995 a. 122, 201; 1997 a. 248, 249; 1999 a. 32, 158; 2001 a. 8, 56, 90, 108.

Cross Reference: *See* also ss. NR 10.001, 10.05, and 10.07, Wis. adm. code.

167.32 Safety at sporting events. (1) DEFINITIONS. In this section:

(a) "Alcohol beverages" means fermented malt beverages and intoxicating liquor.

(b) "Facility" means building or stadium.

(c) "Fermented malt beverages'' has the meaning designated in s. 125.02 (6).

(d) "Intoxicating liquor" has the meaning designated in s. 125.02 (8).

(e) "Passing" includes pushing, pulling, throwing and moving.

(f) "Sports facility" means a facility where sporting events are held, regardless of whether that is the exclusive use of the facility.

(2) BODY PASSING. (a) A spectator at a sporting event at a sports facility shall not participate in the process of passing another person above the floor or ground from one location to another.

(b) Paragraph (a) does not apply to the act of a person moving another person in order to render first aid or otherwise assist or care for that other person.

(3) OBJECT PASSING. A spectator at a sporting event at a sports facility shall not participate in the process of passing bleachers, seats or other objects in a manner which threatens the safety of other persons.

(4) ALCOHOL CONSUMPTION. (a) A spectator shall not bring alcohol beverages into a sports facility where there is a sporting event at the sports facility.

(b) A spectator shall not possess or consume alcohol beverages at a sporting event at a sports facility if the alcohol beverages were brought to the facility as specified in par. (a).

(c) This subsection does not apply to any vendor or other person who brings alcohol beverages into a sports facility with the authorization of the person in charge of the facility.

(5) FORFEITURE. Any person who violates sub. (2), (3) or (4) shall forfeit $50.

(6) CITATION PROCEDURE. The state may use the citation procedures under s. 778.25 to enforce this section. A county or municipality may use the citation procedures under s. 778.25 to enforce a local ordinance strictly conforming to this section.

History: 1985 a. 254.

347.07 Special restrictions on lamps and the use thereof. (1) Whenever a motor vehicle equipped with headlamps also is equipped with any adverse weather lamps, spot lamps or auxiliary lamps, or with any other lamp on the front thereof projecting a beam of intensity greater than 300 candlepower, not more than a total of 4 of any such lamps or combinations thereof on the front of the vehicle shall he lighted at any one time when such vehicle is upon a highway.

(2) Except as otherwise expressly authorized or required by this chapter, no person shall operate any vehicle or equipment on a highway which has displayed thereon:

(a) Any color of light other than white or amber visible from directlv in front: or

(b) Any color of light other than red on the rear; or

(c) Any flashing light.

CHAPTER 440
DEPARTMENT OF REGULATION AND LICENSING

SUBCHAPTER I
GENERAL PROVISIONS

SUBCHAPTER II
PRIVATE DETECTIVES, PRIVATE SECURITY PERSONS

Cross reference: See also RL. Wis. adm. code

SUBCHAPTER I
GENERAL PROVISIONS

440.01 Definitions. (1) In chs. 440 to 480, unless the context requires otherwise:

(a) "Department" means the department of regulation and licensing.

(am) "Financial institution" has the meaning given in s. 705.01 (3).

(b) "Grant" means the substantive act of an examining board, section of an examining board, affliated credentialing board or the department of approving the applicant for credentialing and the preparing, executing, signing or sealing of the credentialing.

(c) "Issue" means the procedural act of the department of transmitting the credential to the person who is credentialed.

(d) "Limit", when used in reference to limiting a credential, means to impose conditions and requirements upon the holder of the credential, and to restrict the scope of the holder's practice.

(dm) "Renewal date" means the date on which a credential expires and before which it must be renewed for the holder to maintain without interruption the rights, privileges and authority conferred by the credential.

(e) "Reprimand" means to publicly wam the holder of a credential.

(f) "Revoke", when used in reference to revoking a credential, means to completely and absolutely terminate the credential and all rights, privileges and authority previously conferred by the credential.

(g) "Secretary" means the secretary of regulation and licensing.

(h) "Suspend", when used in reference to suspending a credential, means to completely and absolutely withdraw and withhold for a period of time all rights, privileges and authority previously conferred by the credential.

(2) In this subchapter: (a) "Credential" means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480.

(b) "Credentialing" means the acts of an examining board, section of an examining board. affiliated credentialing board or the department that relate to granting, issuing, denying, limiting, suspending or revoking a credential.

(bm) "Credentialing board" means an examining board or an affiliated credentialing board in the department.

(c) "Examining board" includes the board of nursing.

(cs) "Minority group member" has the meaning given in s. 560.036 (1) (f).

(cv) "Psychotherapy" has the meaning given in s. 457.01 (8m).

(d) "Reciprocal credential" means a credential granted by an examining board, section of an examining board, affiliated credentialing board or the department to an applicant who holds a credential issued by a governmental authority in a jurisdiction outside this state authorizing or qualifying the applicant to perform acts that are substantially the same as those acts authorized by the credential granted by the examining board, section of the examining board, affiliated credentialing board or department.

History: 1977 c. 418; 1979 c. 34; 1979 c. 175 s. 53; 1979 c. 221 s. 2202 (45); 1991 a. 39; 1993 a. 102, 107; 1995 a. 233. 333; 1997 a. 35 s. 448; 1997 a. 237 ss. 532, 539m; 1999 a. 9 5.2915; 2001 a. 80.

Procedural due process and the separation of functions in state occupational licensing agencies. 1974 WLR 833

440.02 Bonds. Members of the staff of the department who are assigned by the secretary to collect moneys shall be bonded in an amount equal to the total receipts of the department for any month.

440.03 General duties and powers of the department.

(1) The department may promulgate rules defining uniform procedures to be used by the department, the real estate board, the real estate appraisers board, and all examining boards and affiliated credentialing boards attached to the department or an examining board, for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings.

(1m) The department may promulgate rules specifying the number of business days within which the department or any examining board or affiliated credentialing board in the department must review and make a determination on an application for a permit, as defined in s. 560.41 (2), that is issued under chs. 440 to 480.

(2) The department may provide examination development services, consultation and technical assistance to other state agencies, federal agencies, counties, cities, villages, towns, national or regional organizations of state credentialing agencies, similar credentialing agencies in other states, national or regional accrediting associations, and nonprofit organizations. The department may charge a fee sufficient to reimburse the department for the costs of providing such services. In this subsection, "nonprofit organization'' means a nonprofit corporation as defined in s. 181.0103 (17), and an organization exempt from tax under 26 USC 501

(3) If the secretary reorganizes the department, no modification may be made in the powers and responsibilities of the examining boards or affiliated credentialing boards attached to the department or an examining board under s.15.405 or 15.406.

(3m) The department may investigate complaints made against a person who has been issued a credential under chs. 440 to 480.

(3q) Notwithstanding sub. (3m), the department of regulation and licensing shall investigate any report that it receives under s. 146.40 (4r) (am) 2. or (em).

(4) The department may issue subpoenas for the attendance of witnesses and the production of documents or other materials prior to the commencement of disciplinary proceedings.

(5) The department may investigate allegations of negligence by physicians licensed to practice medicine and surgery under ch. 448.

(5m) The department shall maintain a toll–free telephone number to receive reports of allegations of unprofessional conduct, negligence or misconduct involving a physician licensed under subch. II of ch. 448. The department shall publicize the toll– free telephone number and the investigative powers and duties of the department and the medical examining board as widely as possible

in the state, including in hospitals, clinics, medical offices and other health care facilities.

(6) The department shall have access to any information contained in the reports filed with the medical examining board, an affiliated credentialing board attached to the medical examining board and the board of nursing under s. 655.045, as created by 1985 Wisconsin Act 29, and s. 655.26.

(7) The department shall establish the style, content and format of all credentials and of all forms for applying for any credential issued or renewed under ehs. 440 to 480.All forms shall include a place for the information required under sub. (11m) (a). Upon request of any person who holds a credential and payment of a $1 0 fee, the department may issue a wall certificate signed by the governor.

(7m) The department may promulgate rules that establish procedures for submitting an application for a credential or credential renewal by electronic transmission. Any rules promulgated under this subsection shall specify procedures for complying with any requirement that a fee he submitted with the application. The rules may also waive any requirement in chs. 440 to 480 that an application submitted to the department, an examining board or an affiliated credentialing board be executed, verified, signed, sworn or made under oath, notwithstanding ss. 440.26 (2) (b), 440.42 (2) (intro.), 440.91 (2) (intro.), 443.06 (I) (a), 443.10 (2) (a), 445.04 (2), 445.08 (4), 445.095 (1) (a). 448.05 (7), 450.09 (1) (a), 452.10 (I) and 480.08 (2m).

(8) The department may promulgate rules requiring holders of certain credentials to do any of the following:

(a) Display the credential in a conspicuous place in the holder's office or place of practice or business, if the holder is not required by statute to do so.

(b) Post a notice in a conspicuous place in the holder's office or place of practice or business describing the procedures for filing a complaint against the holder.

(9) The department shall include all of the following with each biennial budget request that it makes under s. 16.42:

(a) A recalculation of the administrative and enforcement costs of the department that are attributable to the regulation of each occupation or business under chs. 440 to 480 and that are included in the budget request.

(b) A recommended change to each fee specified under s. 440.05 (1) for an initial credential for which an examination is not required, under s. 440.05 (2) for a reciprocal credential and under s. 440.08 (2) (a) for a credential renewal if the change is necessary to reflect the approximate administrative and enforcement costs of the department that are attributable to the regulation of the particular occupation or business during the period in which the initial or reciprocal credential or credential renewal is in effect and, for purposes of the recommended change to each fee specified under s. 440.08 (2) (a) for a credential renewal, to reflect an estimate of any additional moneys available for the department's general program operations, during the budget period to which the biennial budget request applies, as a result of appropriation transfers that have been or are estimated to be made under s.20.165 (1) (i) prior to and during that budget period.

(11) The department shall cooperate with the department of health and family services to develop a program to use voluntary, uncompensated services of licensed or certified professionals to assist the department of health and family services in the evaluation of community mental health programs in exchange for continuing education credits for the professionals under ss. 448.40 (2) (e) and 455.065 *(5)*.

(11m) (a) Each application form for a credential issued or renewed under chs. 440 to 480 shall provide a space for the department to require each of the following, other than an individual who does not have a social security number and who submits a statement made or subscribed under oath or affirmation as required under par. (am), to provide his or her social security number:

1. An applicant for an initial credential or credential renewal. If the applicant is not an individual, the department shall require the applicant to provide its federal employer identification number.

2. An applicant for reinstatement of an inactive license under s. 452.12 ***(6)*** (e).

(am) If an applicant specified in par. (a) 1. or 2. is an individual who does not have a social security number, the applicant shall submit a statement made or subscribed under oath that the applicant does not have a social security number. The form of the statement shall be prescribed by the department of workforce development. A credential or license issued in reliance upon a false statement submitted under this paragraph is invalid.

(h) The department shall deny an application for an initial credential or deny an application for credential renewal or for reinstatement of an inactive license under s. 452.12 **(6)** (e) if any information required under par. (a) is not included in the application form or, in the ease of an applicant who is an individual and who does not have a social security number, if the statement required under par. (am) is not included with the application form.

(c) The department of regulation and licensing may not disclose a social security number obtained under par. (a) to any person except the coordinated licensure information system under s. 441.50 (7); the department of workforce development for purposes of administering s. 49.22; and, for a social security number obtained under par. (a) 1., the department of revenue for the sole purpose of requesting certifications under s. 73.0301.

(12m) The department of regulation and licensing shall cooperate with the departments of justice and health and family services in developing and maintaining a computer linkup to provide access to information regarding the current status of a credential issued to any person by the department of regulation and licensing, including whether that credential has been restricted in any way.

(13) The department may conduct an investigation to determine whether an applicant for a credential issued under chs. 440 to 480 satisfies any of the eligibility requirements specified for the credential, including whether the applicant does not have an arrest or conviction record. In conducting an investigation under this subsection, the department may require an applicant to provide any information that is necessary for the investigation or, for the purpose of obtaining information related to an arrest or conviction record of an applicant, to complete forms provided by the department of justice or the federal bureau **of** investigation. The department shall charge the applicant any fees, costs or other expenses incurred in conducting the investigation under this subsection.

(14) (a) 1. The department shall grant a certificate of registration as a music therapist to a person if all of the following apply: a. The person is certified, registered or accredited as a music therapist by the Certification Board for Music Therapists, National Music Therapy Registry, American Music Therapy Association or by another national organization that certifies, registers or accredits music therapists. **b.** The organization that certified. registered or accredited the person under subd.1. a. is approved by the department. c. The person pays the fee specified in s. 440.05 (1) and files with the department evidence satisfactory to the department that he or she is certified, registered or accredited **as** required under subd.1. a.

2. The department shall grant a certificate of registration as an art therapist to a person if all of the following apply: a. The person is certified, registered or accredited as an art therapist by the Art Therapy Credentials Board or by another national organization that certifies, registers or accredits art therapists. b. The organization that certified, registered or accredited the person under subd.2. a. is approved by the department. c. The person pays the fee specified in s. 440.05 (I) and files with the department evidence satisfactory to the department that he or she is certified, registered or accredited as required under subd.2. a.

3. The department shall grant a certificate of registration **as** a dance therapist to a person if all of the following apply:

a. The person is certified, registered or accredited as a dance therapist by the American Dance Therapy Association **or** by another national organization that certifies, registers or accredits dance therapists.b. The organization that certified, registered or accredited the person under subd.3. a. is approved by the department.

c. The person pays the fee specified in s. 440.05 (1) and files with the department evidence satisfactory to the department that he or she is certified, registered or accredited as required under subd.3. a.

(am) The department may promulgate rules that establish requirements for granting a license to practice psychotherapy to a

person who is registered under par. (a). Rules promulgated under this paragraph shall establish requirements for obtaining such a license that are comparable to the requirements for obtaining a clinical social worker, marriage and family therapist, or professional counselor license under ch. 457. If the department promulgates rules under this paragraph, the department shall grant a license under this paragraph to a person registered under par. (a) who pays the fee specified in s. 440.05 (1) and provides evidence satisfactory to the department that he or she satisfies the requirements established in the rules(b) A person who is registered under par. (a) shall notify the department in writing within 30 days if an organization specified in par. (a) 1. a., 2. a. or 3. a. revokes the person's certification, registration, or accreditation specified in par. (a) 1. a., 2. a., or 3. a. The department shall revoke a certificate of registration granted under par. (a) if such an organization revokes such a certification, registration, or accreditation. If the department revokes the certificate of registration of a person who also holds a license granted under the rules promulgated under par. (am), the department shall also revoke the license.

(c) The renewal dates for certificates granted under par. (a) and licenses granted under par. (am) are specified in s. 440.08 (2) (a). Renewal applications shall be submitted to the department on a form provided by the department and shall include the renewal fee specified in s. 440.08 (2) (a) and evidence satisfactory to the department that the person's certification, registration, or accreditation specified in par. (a) 1. a., 2. a. or 3. a. has not been revoked.

(d) The department shall promulgate rules that specify the services within the scope of practice of music, art, or dance therapy that a person who is registered under par. (a) is qualified to perform. The rules may not allow a person registered under par. (a) to perform psychotherapy unless the person is granted a license under the rules promulgated under par. (am).

Cross reference: See also chs. RL 140, 141, **and 142,** Wis. adm. **code.**

(e) Subject to the rules promulgated under sub. (1), the department may make investigations and conduct hearings to determine whether a violation of this subsection or any rule promulgated under par. (d) has occurred and may reprimand a person who is registered under par. (a) or holds a license granted under the rules promulgated under par. (am)or may deny, limit, suspend, or revoke a certificate of registration granted under par. (a) or a license granted under the rules promulgated under par. (am) if the department finds that the applicant or certificate or license holder has violated this subsection or any rule promulgated under par. (d).

(f) A person who is registered under par. (a) or holds a license granted under the rules promulgated under par. (am) who violates this subsection or any rule promulgated under par. (d) may be fined not more than $200 or imprisoned for not more than 6 months or both.

(15) The department shall promulgate rules that establish the fees specified in ss. 440.05 (10) and 440.08 (2) (d).

(16) Annually, the department shall distribute the form developed by the medical and optometry examining boards under 2001 Wisconsin Act 16, section 9143 (3c), to all school districts and charter schools that offer kindergarten, to be used by pupils to provide evidence of eye examinations under s. 118.135.

History: 1977 c. 418 ss. 24, 792; 1979 c. 34, 221, 337: 1981 c. 94; 1985 a. 29, 340; 1989 a. 31, 340; 1991 a. 39; 1993 a. 16, 102, 107, 443, 445, 490, 491; **1995 a. 27** ss. 6472g, 6472i, 9126 (19); 1995 a. 233; 1997 a. 27, 75, 79; **1997 a. 191 ss. 312, 313,** 318; 1997 a. 231, 237; 1997 a. 261 **ss.** 1 to 4, 7, 10, 13; 1997 a. 311; **1999 a. 9, 32; 2W1 a. 16, 66, SO.**

Cross reference: See also **RL,** Wis. adm. code.

440.035 General duties of examining boards and affiliated credentialing boards. Each examining board or affiliated credentialing board attached to the department or an examining board shall:

(1) Independently exercise its powers, duties and functions prescribed by law with regard to rule−making, credentialing and regulation.

(2) Be the supervising authority of all personnel, other than shared personnel, engaged in the review, investigation or handling of information regarding qualifications of applicants for credentials, examination questions and answers, accreditation, related investigations and disciplinary matters affecting persons who are credentialed by the examining board or affiliated credentialing board, or in the establishing of regulatory policy or the exercise of administrative discretion with regard to the qualifications or discipline of applicants or persons who are credentialed by the examining board, affiliated credentialing board or accreditation.

(3) Maintain. in conjunction with their operations, in central locations designated by the department, all records pertaining to the functions independently retained by them.

(4) Compile and keep current a register of the names and addresses of all persons who are credentialed to be retained by the department and which shall be available for public inspection during the times specified in s. 230.35 (4) (a). The department may also make the register available to the public by electronic transmission.

History: **1977 c. 418 ss. 25,** *793,* **929 (41); 1979 c. 32 s. 92 (3); 1979 c. 34; 1989 a.** 56 s. 259; 1991 a. 39; 1993 a. 107; 1997 a. 27, 191, 237.

440.04 Duties of the secretary. The secretary shall: (1) Centralize, at the capital and in such district offices as the operations of the department and the attached examining boards and affiliated credentialing boards require, the routine housekeeping functions required by the department, the examining boards and the affiliated credentialing boards.

(2) Provide the bookkeeping, payroll, accounting and personnel advisory services required by the department arid the legal services, except for representation in court proceedings and the preparation of formal legal opinions, required by the attached examining boards and affiliated credentialing boards.

(3) Control the allocation, disbursement and budgeting of the funds received by the examining boards and affiliated credentialing boards in connection with their credentialing and regulation.

(4) Employ, assign and reassign such staff as are required by the department and the attached examining boards and affiliated credentialing hoards in the performance of their functions.

(5) With the advice of the examining boards or affiliated credentialing boards:

(a) Provide the department with such supplies, equipment, office space and meeting facilities as are required for the efficient operation of the department.

(h) Make all arrangements for meetings, hearings and examinations(c) Provide such other services as the examining boards or affiliated credentialing boards request.

(6) Appoint outside the classified service an administrator for any division established in the department and a director for any bureau established in the department as authorized in s. 230.08 **(2).** The secretary may assign any bureau director appointed in accordance with this subsection to serve concurrently as a bureau director and a division administrator.

(7) Unless otherwise specified in chs. 440 to 480, provide examination development, administration, research and evaluation services as required.

(8) Collect data related to the registration of speech−language pathologists and audiologists under suhch. III of ch. 459 and, on January 15, 1993, report the data and recommendations on whether the licensure of speech−language pathologists and audiologists under suhch, II of ch. 459 is appropriate to the chief clerk of each house of the legislature for distribution in the manner provided under s.13.172 (2).

(9) Annually prepare and submit a report to the legislature under s. 13.172 (2) on the number of minority group members who applied for licensure as a certified public accountant under ch. 442, the number who passed the examination required for licensure as a certified public accountant and the number who were issued a certified public accountant license under ch. 442, during the preceding year.

History: 1977 c. 418 s. 26; 1979 c. 34; 1981 c. 211; 1985 a. *29:* **1987 a. 27; 1989 a.** 316; 1991 a. 39; 1993 a. 102, 107; 1995 a. 333.

440.042 Advisory committees. (1) The secretary may appoint persons or advisory committees to advise the department and the boards, examining boards and affiliated credentialing hoards in the department on matters relating to the regulation of credential holders. The secretary shall appoint an advisory committee to advise the department on matters relating to carrying

out the duties specified in s. 440.982 and making investigations, conducting hearings and taking disciplinary action under s. 440.986. A person or an advisory committee member appointed under this subsection shall serve without compensation, but may be reimbursed for his or her actual and necessary expenses incurred in the performance of his or her duties.

(2) Any person who in good faith testifies before the department or any examining board, affiliated credentialing board or board in the department or otherwise provides the department or any examining board, affiliated credentialing board or board in the department with advice or information on a matter relating to the regulation of a person holding a credential is immune from civil liability for his or her acts or omissions in testifying or otherwise providing such advice or information. The good faith of any person specified in this subsection shall be presumed in any civil action and an allegation that such a person has not acted in good faith must be proven by clear and convincing evidence.

History: 1993 a. 16 ss. 3269,3299; 1993 a. 107; 1997 a. 156; 1999 a. 32.

440.045 Disputes. Any dispute between an examining board or an affiliated credentialing board and the secretary shall he arbitrated by the governor or the governor's designee after consultation with the disputants.

History: 1977 c. 418 s. 27; 1979 c. 34; 1993 a. 107.

The relationship between the department, cosmetology examining board, and governor is discussed. 70 Atty. Gen. 172.

440.05 Standard fees. The following standard fees apply to all initial credentials, except as provided in ss. 440.42, 440.43, 440.44, 440.51, 444.03, 444.05, 444.11, 447.04 (2) (c) 2., 449.17, 449.18 and459.46:

(1) (a) Initial credential: $53. Each applicant for an initial credential shall pay the initial credential fee to the department when the application materials for the initial credential are submitted to the department.

(b) Examination: If an examination is required, the applicant shall pay an examination fee to the department. If the department prepares, administers, or grades the examination, the fee to the department shall be an amount equal to the department's best estimate of the actual cost of preparing, administering, or grading the examination. If the department approves an examination prepared, administered, and graded by a test service provider, the fee to the department shall be an amount equal to the department's best estimate of the actual cost of approving the examination, including selecting, evaluating, and reviewing the examination.

(2) Reciprocal credential, including any credential described in s. 440.01 (2) (d) and any credential that permits temporary practice in this state in whole or in part because the person holds a credential in another jurisdiction: The applicable credential renewal fee under s. 440.08 (2) (a) and, if an examination is required, an examination fee under sub. (1).

(6) Apprentice, journeyman, student or other temporary credential, granted pending completion of education, apprenticeship or examination requirements: $10.

(7) Replacement of lost credential, name or address change on credential, issuance of duplicate credential or transfer of credential: $10.

(9) Endorsement of persons who are credentialed to other states: $10.

(10) Expedited service: If an applicant for a credential requests that the department process an application on an expedited basis, the applicant shall pay a service fee that is equal to the department's best estimate of the cost of processing, the application on an expedited basis, including the cost of providing counter or other special handling services.

History: 1977 c. 29 418; 1979 c. 34; 1979 c. 175 s. 53; 1979 c. 221 s. 2202 (45); 1983 a. 27; 1985 a. 26; 1987 a. 264, 265, 329. 399, 403; 1989 a. 31, 229. 307, 316. 336, 340, 341, 359; 1991 a. 39, 269, 278, 315; 1993 a. 16; 1995 a. 27; 1997 a. 27.96; 1999 a 9 2001 a 16.

Cross reference: *See* also ch. RL 4, Wir. adm. code.

440.055 Credit card payments. (2) If the department permits the payment of a fee with use of a credit card, the department shall charge a credit card service charge for each transaction. The credit card service charge shall be in addition to the fee that is being paid with the credit card and shall be sufficient to pay the costs to the department for providing this service to persons who request it, including the cost of any services for which the department contracts under sub. (3).

(3) The department may contract for services relating to the payment of fees by credit card under this section.

History: 1995 a. 27; 1999 a. 9

440.06 Refunds and reexaminations. The secretary may establish uniform procedures for refunds of fees paid under s. 440.05 or 440.08 and uniform procedures and fees for reexaminations under chs. 440 to 480.

History: 1977 c. 418; 1979 c. 175 s. 53; 1979 c. 221 a. 2202 (45); 1991 a. 39; 1993 a. 102.

Cross reference: *See* also ch. RL 4, Wis. adm. code.

440.07 Examination standards and services. (1) In addition to the standards specified in chs. 440 to 480, examinations for credentials shall reasonably relate to the skills likely to be needed for an applicant to practice in this stale at the time of examination and shall seek to determine the applicant's preparedness to exercise the skills.

(2) The department, examining board or affiliated credentialing hoard having authority to credential applicants may do any of the following:

(a) Prepare, administer and grade examinations(b) Approve, in whole or in part, an examination prepared, administered and graded by a test service provider.

(3) The department may charge a fee to an applicant for a credential who fails an examination required for the credential and requests a review of his or her examination results. The fee shall be based on the cost of the review. No fee may be charged for the review unless the amount of the fee or the procedure for determining the **amount** of the fee is specified in rules promulgated by the department.

History: 1987 a. 27; 1991 a. 39; 1993 a. 102, 107.

Cross reference: See also ch. RL 4, Wis. adm. code. Department of Regulation and Licensing test scores were subject to disclosure under the open records law. Munroe v. Braatz, 201 Wis. 2d 442, 549 N.W.2d 452 (Ct. App. 1996).

440.08 Credential renewal. (1) NOTICE OF RENEWAL. The department shall give a notice of renewal to each holder of a credential at least 30 days prior to the renewal date of the credential. Notice may be mailed to the last address provided to the department by the credential holder or may be given by electronic transmission. Failure to receive a notice of renewal is not a defense in any disciplinary proceeding against the holder or in any proceeding against the holder for practicing without a credential. Failure to receive a notice of renewal does not relieve the holder from the obligation to pay a penalty for late renewal under sub. (3).

(2) RENEWAL DATES, FEES AND APPLICATIONS. (a) Except as provided in par. (b) and in ss. 440.51, 442.04, 444.03, 444.05, 444.11, 448.065, 447.04 (2) (c) 2., 449.17, 449.18 and 459.46, the renewal dates and renewal fees for credentials are as follows:

1. Accountant, certified public: January 1 of each even–numbered year; $59.

3. Accounting corporation or partnership: January 1 of each even–numbered year; $56.

4. Acupuncturist July 1 of each odd–numbered year; $70. 4m. Advanced practice nurse prescriber: October 1 of each even–numbered year; $73.

5. Aesthetician: July 1 ofeach odd–numbered year; $87.

6. Aesthetics establishment: Julv 1 of each odd–numbered year: $70.

7. Aesthetics instructor: July 1 of each odd–numbered year; $70.

8. Aesthetics school: July 1 of each odd–numbered year; $115.

9. Aesthetics specialty school: July I of each odd–numbered year; $53.

11. Appraiser, real estate, certified general: January 1 of each even–numbered year; $162. l Im. Appraiser, real estate, certified residential: January 1 of each even–numbered year; $167.

12. Appraiser, real estate, licensed: January 1 of each even–numbered year; $185.

13. Architect: August 1 ofeach even–numbered year; $60.

14. Architectural or engineering firm, partnership or corporation: February 1 of each even–numbered year; $70.

14f. Athletic trainer: July 1 of each even–numbered year; $53.

14g. Auction company: January 1 of each odd–numbered year; $56.

14r. Auctioneer: January 1 ofeach odd–numbered year; $174.

15. Audiologist: February 1 ofeach odd–numbered year; $106.

16. Barbering or cosmetology establishment: July 1 of each odd–numbered year; $56.

17. Barbering or cosmetology instructor: July 1 of each odd–numbered year; $91

18. Barbering or cosmetology manager: July 1 of each odd–numbered year; $71

19. Barbering or cosmetology school: July 1 of each odd–numbered year; $138.

20. Barber or cosmetologist: July 1 of each odd—umbered year; $63.

21. Cemetery authority: January 1 of each odd–numbered year; $343.

22. Cemetery preneed seller: January 1 of each odd–numbered year; $61

23. Cemetery salesperson: January 1 of each odd–numbered year; $90. 23m. Charitable organization: August 1 of each year; $15.

24. Chiropractor: January 1 ofeach odd–numbered year; $168.

25. Dental hygienist: Ocrober 1 of each odd–numbered year; $57.

26. Dentist: October 1 ofeach odd–numbered year; $131.

26m. Dentist, faculty member: October 1 of each odd–numbered year; $131.

27. Designer of engineering systems: February 1 of each even–numbered year; $58.

27m. Dietitian: November 1 of each even–numbered year; $56.

28. Drug distributor: June 1 of each even–numbered year; $70.

29. Drug manufacturer: June 1 of each even–numbered year; $70.

30. Electrologist: July 1 of each odd–numbered year; $76.

31. Electrology establishment: July 1 of each odd–numbered year; $56.

32. Electrology instructor: July 1 of each odd–numbered year; $86. _

33. Electrologyschool: July 1 of each odd–numbered year; $71

34. Electrology specialty school: July 1 of each odd–numbered year; $53.

35. Engineer, professional: August 1 of each even–numbered year; $58.

35m. Fund-raising counsel: September 1 of each even–numbered year; S53.

36. Funeral director: January I of each even–numbered year; $135.

37. Funeral establishment June 1 of each odd–numbered year; $56.

38. Hearing instrument specialist: February 1 of each odd–numbered year; $106.

38g. Home inspector: January 1 of each odd–numbered year; $53.

38m. Landscape architect: August 1 of each even–numbered year; $56.

39. Land surveyor: February 1 of each even–numbered year; $77.

42. Manicuring establishment: Julv 1 of each odd–numbered year; $53.

43. Manicuring instructor: July I of each odd–numbered year; $53.

44. Manicuring school: July 1 of each odd–numbered year; $1 18.

45. Manicuring specialty school: July 1 of each odd–numbered year; $53.

46. Manicurist: July 1 of each odd–numbered year; $133.

46m. Marriage and family therapist: July 1 of each odd–numbered year; $84.

46r. Massage therapist or bodyworker: March 1 of each odd–numbered year; $53.

NOTE: Subd. 46r. is crested eff. 5-1-03 by 2001 Wis. Act 74.

48. Nurse, licensed practical: May 1 of each odd–numbered year; $69.

49. Nurse, registered: March I of each even–numbered year; $66.

50. Nurse–midwife: March 1 of each even–numbered year; $70.

51. Nursing home administrator: July 1 of each even–numbered year; $120.

52. Occupational therapist: November 1 of each odd–numbered year; $59.

53. Occupational therapy assistant: November 1 of each odd–numbered year; $62.

54. Optometrist: January 1 ofeach even–numbered year; $65.

54m. Perfusionist: November 1 of each odd–numbered year; $56.

55. Pharmacist: June 1 ofeach even–numbered year; $97.

56. Pharmacy: June 1 of each even–numbered year; $56.

57. Physical therapist: November 1 of each odd–numbered year; $62.

57m. Physical therapist assistant: November 1 of each odd–numbered year; $44.

NOTE Subd. 57m. is created eff. 61-04 by 2001 Wis. Act 70.

58. Physician: November 1 ofeach odd–numbered year; $106.

59. Physician assistant: November 1 of each odd–numbered year; $72.

60. Podiatrist: November 1 of each odd–numbered year; $150.

61. Private detective: September 1 of each even–numbered year; $101.

62. Private detective agency: September 1 of each even–numbered year; $53.

63. Private practice school psychologist: October 1 of each odd–numbered year; $103.

63g. Private security person: September 1 of each even–numbered year; $53.

63m. Professional counselor: July 1 of each odd–numbered year; $76.

63t. Professional fund–raiser: September 1 of each even–numbered year; $93.

63u. Professional geologist: August 1 of each even–numbered year; $59.

63v. Professional geology, hydrology or soil science firm, partnership or corporation: August 1 of each even–numbered year; $53.

63w. Professional hydrologist: August 1 of each even–numbered year; $53.

63x. Professional soil scientist: August 1 of each even–numbered year; $53.

64. Psychologist: October 1 of each odd–numbered year: $157.

65. Real estate broker: January 1 **of** each odd–numbered year; $128.

66. Real estate business entity: January 1 of each odd–numbered year; $56.

67. Real estate salesperson: January 1 of each odd–numbered year; $83.

67m. Registered interior designer: August 1 of each even–numbered year; $56.

67q. Registered massage therapist or bodyworker: March 1 of each odd–numbered year; $53.

SOTE Subd. 67q. is repealed eff. 3–1–03 by 2001 Wir. Act 14.

67v. Registered music, art or dance therapist: October 1 of each odd–numbered year; $53.

67x. Registered music, ***art,*** or dance therapist with psychotherapy license: October 1 of each odd–numbered year; $53.

68. Respiratory care practitioner: November 1 of each odd–numbered year; $65.

68d. Social worker: July I of each odd–numbered year; S63.

68h. Social worker, advanced practice: July 1 of each odd–numbered year; $70.

68p. Social worker, independent: July 1 of each odd—umbered year; $58.

68t. Social worker, independent clinical: July 1 of each odd–numbered year; $73.

68v. Speech–language pathologist: February 1 of each odd–numbered year; $63.

69. Timeshare salesperson: January 1 **of** each odd–numbered year; $119.

70. Veterinarian: January 1 of each even–numbered year; $105.

71. Veterinary technician: January 1 of each even–numbered year; $58.

(b) The renewal fee for an apprentice, journeyman, student or temporary credential is $10. The renewal dates specified in par. (a)

do not apply to apprentice, journeyman, student or temporary credentials(c) Except as provided in sub. (3), renewal applications shall include the applicable renewal fee specified in pars. (a) and (b).

(d) If an applicant for credential renewal requests that the department process an application on an expedited basis, the applicant shall pay a service fee that is equal to the department's best estimate of the cost of processing the application on an expedited basis, including the cost of providing counter or other special handling services.

(3) LATE RENEWAL.(a) Except as provided in rules promulgated under par. (h), if the department does not receive an application to renew a credential before its renewal date, the holder of the credential may restore the credential by payment of the applicable renewal fee specified in sub. (2) (a) and by payment of a late renewal fee of $25.

(h) The department or the interested examining hoard or affiliated credentialing hoard, as appropriate, may promulgate rules requiring the holder of a credential who fails to renew the credential within 5 years after its renewal date to complete requirements in order to restore the credential, in addition to the applicable requirements for renewal established under chs. 440 to 480, that the department, examining board or affiliated credentialing hoard determines is necessary to protect the public health, safety or welfare. The rules may not require the holder to complete educational requirements or pass examinations that are more extensive than the educational or examination requirements that must he completed in order to obtain an initial credential from the department, the examining board or the affiliated credentialing hoard.

(4) DENIAL OF CREDENTIAL RENEWAL.(a) ***Generally.*** If the department or the interested examining board or affiliated credentialing board, as appropriate, determines that an applicant for renewal has failed to comply with sub. (2) (c) or (3) or with any other applicable requirement for renewal established under chs. 440 to 480 or that the denial of an application for renewal of a credential is necessary to protect the public health, safety or welfare, the department, examining board or affiliated credentialing board may summarily deny the application for renewal by mailing to the holder of the credential a notice of denial that includes a statement of the facts or conduct that warrant the denial and a notice that the holder may, within 30 days after the date on which the notice of denial is mailed, file a written request with the department to have the denial reviewed at a hearing before the department, if the department issued the credential, or before the examining hoard or affiliated credentialing hoard that issued the credential.

(h) ***Applicability.*** This subsection does not apply to a denial of a credential renewal under s. 440.12 or 440.13 (2) (h).

History: 1991 a. 39 ss. 3305,331); 1991 a. 78, 160, 167,269,278,315; 1993 a. 3, 14 102, 105, 107,443, 463,465; 1993 a. 490 ss. 228 to 230, 274, 275: 1995 a. 27, 233, 321, 322, 461; 1997 a. 27, 75, 81, 96, 156, 191,237. 261, 300; 1999 a. 9, 32; 2001 a. 16, 70, 74, *80*, 89.

440.11 Change of name or address. 1) An applicant for or recipient of a credential who changes his or her name or moves from the last address provided to the department shall notify the department of his or her new name or address within 30 days of the change in writing or in accordance with other notification procedures approved by the department.

(2) The department or any examining hoard, affiliated credentialing board or hoard in the department may serve any process, notice or demand on the holder of any credential by mailing it to the last–known address of the holder as indicated in the records of the department, examining hoard, affiliated credentialing hoard or hoard.

(3) Any person who fails to comply with sub. (1) shall he subject to a forfeiture of $50.

History: 1987 a. *27;* 1991 a. 39; 1993 a. 107; 1997 a. 27.

440.12 Credential denial, non-renewal and revocation based on tax delinquency. Notwithstanding any other provision of chs. 440 to 480 relating to issuance or renewal of a credential, the department shall deny an application for an initial credential or credential renewal or revoke a credential if the department of revenue certifies under s. 73.0301 that the applicant or credential holder is liable for delinquent taxes, as defined in s. 73.0301 (1) (c).

History: 1997 a. 237.

Cross reference: See also **ch.** RL 9, **Wis. adm. code**

440.13 Delinquency in support payments; failure to comply with subpoena or warrant. (1) In this section:

(h) "Memorandum of understanding" means a memorandum of understanding entered into by the department of regulation and licensing and the department of workforce development under s. 49.857.

(c) "Support" has the meaning given in s. 49.857 (1) (g).

(2) Notwithstanding any other provision of chs. 440 to 480 relating to issuance of an initial credential or credential renewal, as provided in the memorandum of understanding:

(a) With respect to a credential granted by the department, the department shall restrict, limit or suspend a credential or deny an application for an initial credential or for reinstatement of an inactive license under s. 452.12 *(6)* (e) if the credential holder or applicant is delinquent in paying support or fails to comply, after appropriate notice, with a subpoena or warrant issued by the department of workforce development or a county child support agency under s. 59.53 *(5)* and related to support or paternity proceedings(b) With respect to credential renewal, the department shall deny an application for renewal if the applicant is delinquent in paying support or fails to comply, after appropriate notice, with a subpoena or warrant issued by the department of workforce development or a county child support agency under s. 59.53 *(5)* and related to support or paternity proceedings(c) With respect to a credential granted by a credentialing hoard, a credentialing hoard shall restrict, limit or suspend a credential held by a person or deny an application for an initial credential when directed to do ***so*** by the department.

History: 1997 a. 191, 237.

440.14 Nondisclosure of certain personal information.

(1) In this section: (a) "List" means information compiled or maintained by the department or a credentialing hoard that contains the personal identifiers of 10 or more individuals(b) "Personal identifier" means a name, social security number, telephone number, street address, post–office box number or 9–digit extended zip code.

(2) If a form that the department or a credentialing hoard requires an individual to complete in order to apply for a credential or credential renewal or to obtain a product or service from the department or the credentialing hoard requires the individual to provide any of the individual's personal identifiers, the form shall include a place for the individual to declare that the individual's personal identifiers obtained by the department or the credentialing hoard from the information on the form may not he disclosed on any list that the department or the credentialing board furnishes to another person.

(3) If the department or a credentialing hoard requires an individual to provide, by telephone or other electronic means, any of the individual's personal identifiers in order to apply for a credential or credential renewal or to obtain a product or service from the department or a credentialing hoard, the department or the credentialing hoard shall ask the individual at the time that the individual provides the information if the individual wants to declare that the individual's personal identifiers obtained by telephone or other electronic means may not he disclosed on any list that the department or the credentialing hoard furnishes to another person.

(4) The department or a credentialing board shall provide to an individual upon request a form that includes a place for the individual to declare that the individual's personal identifiers obtained by the department or credentialing hoard may not he disclosed on any list that the department or credentialing hoard furnishes to another person.

(5)(a) The department or a credentialing board may not disclose on any list that it furnishes to another person a personal identifier of any individual who has made a declaration under sub. (2), (3) or (4).

(h) Paragraph (a) does not apply to a list that the department or a credentialing hoard furnishes to another state agency, a law enforcement agency or a federal governmental agency. In

addition, par. (a) does not apply to a list that the department or the board of nursing furnishes to the coordinated licensure information system under s. 441.50 (7). A state agency that receives a list from the department or a credentialing board containing a personal identifier of any individual who has made a declaration under sub. (2), (3) or (4) may not disclose the personal identifier to any person other than a state agency, a law enforcement agency or a federal governmental agency.

History: 1999 a. 88; 2001 a. 66.

440.142 Reporting potential causes of public health emergency. **(1)** A pharmacist or pharmacy shall report to the department of health and family services all of the following:

(a) An unusual increase in the number of prescriptions dispensed or nonprescription drug products sold for the treatment of medical conditions specified by the department of health and family services by rule under s. 252.02 (7).

(b) An unusual increase in the number of prescriptions dispensed that are antibiotic drugs(c) The dispensing of a prescription for treatment of a disease that is relatively uncommon or may be associated with bioterrorism, as defined in s. 166.02 (1r).

(2) (a) Except as provided in par. (b), a pharmacist or pharmacy may not report personally identifying information concerning an individual who is dispensed a prescription or who purchases a nonprescription drug product as specified in sub. (1) (a), (b), or (c).

(b) Upon request by the department of health and family services, a pharmacist or pharmacy shall report to that department personally identifying information other than a social security number concerning an individual who is dispensed a prescription or who purchases a nonprescription drug product as specified in sub. (1) (a), (b), or (c).

History: 2001 a. 109.

440.20 Disciplinary proceedings. **(1)** Any person may file a complaint before the department or any examining board, affiliated credentialing board or board in the department and request the department, examining board, affiliated credentialing board or board to commence disciplinary proceedings against any holder of a credential.

(3) The burden of proof in disciplinary proceedings before the department or any examining board, affiliated credentialing board or board in the department is a preponderance of the evidence.

(4) In addition to any grounds for discipline specified in chs. 440 to 480, the department or appropriate examining board, affiliated credentialing board or board in the department may reprimand the holder of a credential or deny, limit, suspend or revoke the credential of any person who intentionally violates s. 252.14 **(2)** or intentionally discloses the results of a blood test in violation of s. 252.15 *(5)* (a) or (5m).

History: 1977 c. 418; 1979 c. 34; **1985 a.** 29; 1989 a. 31, 201; 1991 a. 39; 1993 a. 16, 27, 102, 107, 490.

The constitutionality of **sub.** *(3)* is **upheld.** Gandhi v. **Medical** Examining Board, 168 Wis. **2d** 299,483 N.W.2d 295 (Ct. App. 1992).

A hearing is not required for a complaint filed under this section. **68** Atty. **Gen.** 30. The **"preponderance** of the **evidence" burden of** proof **under** sub. *(3)* **does not** violate the **due** process rights **of a licensee. 75** Atty. Gen. 76.

440.205 Administrative warnings. If the department or a board, examining board or affiliated credentialing board in the department determines during an investigation that there is evidence of misconduct by a credential holder, the department, board, examining board or affiliated credentialing board may close the investigation by issuing an administrative warning to the credential holder. The department or a board, examining board or affiliated credentialing board may issue an administrative warning under this section only if the department or board, examining board or affiliated credentialing board determines that no further action is warranted because the complaint involves a first occurrence of a minor violation and the issuance of an administrative warning adequately protects the public by putting the credential holder on notice that any subsequent violation may result in disciplinary action. If an administrative warning is issued, the credential holder may obtain a review of the administrative warning through a personal appearance before the department, board, examining board or affiliated credentialing board that issued the administrative warning. Administrative warnings do not constitute an adjudication of guilt or the imposition of discipline and may not be used as evidence that the credential holder is guilty of the alleged misconduct. However, if a subsequent allegation of misconduct by the credential holder is received by the department or a board, examining board or affiliated credentialing board in the department, the matter relating to the issuance of the administrative warning may be reopened and disciplinary proceedings may be commenced on the matter, or the administrative warning may be used in any subsequent disciplinary proceeding as evidence that the credential holder had actual knowledge that the misconduct that was the basis for the administrative warning was contrary to law. The record that an administrative warning was issued shall be a public record. The contents of the administrative warning shall be private and confidential. The department shall promulgate rules establishing uniform procedures for the issuance and use of administrative warnings.

History: 1997 a. 139.

Cross reference: See also ch. RL 8, Wis. adm. **code**

440.21 Enforcement of laws requiring credential. (1) The department may conduct investigations, hold hearings and make findings as to whether a person has engaged in a practice or used a title without a credential required under chs. 440 to 460.

(2) If, after holding a public hearing, the department determines that a person has engaged in a practice or used a title without a credential required under chs. 440 to 460, the department may issue a special order enjoining the person from the continuation of the practice or use of the title.

(3) In lieu of holding a public hearing, if the department has reason to believe that a person has engaged in a practice or used a title without a credential required under chs. 440 to 460, the department may petition the circuit court for a temporary restraining order or an injunction as provided in ch. 813.

(4) (a) Any person who violates a special order issued under sub. **(2)** may be required to forfeit not more than $10,000 for each offense. Each day of continued violation constitutes a separate offense. The attorney general or any district attorney may commence an action in the name of the state to recover a forfeiture under this paragraph.

(b) Any person who violates a temporary restraining order or an injunction issued by a court upon a petition under sub. (3) may be fined not less than $25 nor more than $5,000 or imprisoned for not more than one year in the county jail or both.

History: 1991 a. 39; 1993 a. 102.

Cross reference: See also ch. RL 3, Wis. adm. code.

440.22 Assessment of costs. (1) In this section, "costs of the proceeding" means the compensation and reasonable expenses of hearing examiners and of prosecuting attorneys for the department, examining board or affiliated credentialing board, a reasonable disbursement for the service of process or other papers, amounts actually paid out for certified copies of records in any public office, postage, telephoning, adverse examinations and depositions and copies, expert witness fees, wimess fees and expenses, compensation and reasonable expenses of experts and investigators, and compensation and expenses of a reporter for recording and transcribing testimony.

(2) In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department. Interest shall accrue on costs assessed under this subsection at a rate of 12% per year beginning on the date that payment of the costs are due as ordered by the department, examining board, affiliated credentialing board or board. Upon the request of the department of regulation and licensing, the department of justice may commence an action to recover costs assessed under this subsection and any accrued interest.

(3) In addition to any other discipline imposed, if the department, examining board, affiliated credentialing board or

hoard assesses costs of the proceeding to the holder of the credential under sub. (2), the department, examining hoard, affiliated credentialing hoard or hoard may not restore, renew or otherwise issue any credential to the holder until the holder has made payment to the department under sub. (2) in the full amount assessed, together with any accrued interest.

History: 1987 a. 27: 1991 a. 39: 1993 a. 107; 1997 a. 27.

The collection of costs assessed under this section may not be pursued in an independent action for a money judgment. The costs may be collected only as a condition of reinstatement of the disciplined practitioner's credentials. State v. Dunn, 213 Wis. 2d 363, 570 N.W.2d 614 (Ct. App. 1997).

440.23 Cancellation of credential; reinstatement. **(1)** If the holder of a credential pays a fee required under s. 440.05 (1) or (6), 440.08, 444.03, 444.05, 444.11 or 459.46 (2) (b) by cheek or debit or credit card and the check is not paid by the financial institution upon which the check *is* drawn *or* if *the* demand for payment under the debit or credit card transaction is not paid by the financial institution upon which demand is made, the department may cancel the credential on or after the 60th day after the department receives the notice from the financial institution, subject to sub. (2).

(2) At least 20 days before canceling a credential, the department shall mail a notice to the holder of the credential that informs the holder that the check or demand for payment under the debit or credit card transaction was not paid by the financial institution and that the holder's credential may be canceled on the date determined under sub. (1) unless the holder does all of the following before that date:

(a) Pays the fee for which the unpaid check or demand for payment under the credit or debit card transaction was issued.

(h) If the fee paid under par. (a) is for renewal and the credential has expired, pays the applicable penalty for late renewal specified in s. 440.08 (3).

(c) Pays the charge for an unpaid draft established by the depository selection hoard under s.20.905 (2).

(3) Nothing in sub. (1) or (2) prohibits the department from extending the date for cancellation to allow the holder additional time to comply with sub. (2) (a) to (c).

(4) A cancellation of a credential under this section completely terminates the credential and all rights, privileges and authority previously conferred by the credential.

(5) The department may reinstate a credential that has been canceled under this section only if the previous holder complies with sub. (2) (a) to (c) and pays a $30 reinstatement fee.

History: 1989 a. 31; 1991 a. 39, 189,269,278. 315; 1993 a. 16; 1995 a. 27; 1999 a. 9.

440.25 Judicial review. The department may seek judicial review under ch. 227 of any final disciplinary decision of the medical examining hoard or affiliated credentialing hoard attached to the medical examining hoard. The department shall be represented in such review proceedings by an attorney within the department. Upon request of the medical examining hoard or the interested affiliated credentialing hoard, the attorney general may represent the board. If the attorney general declines to represent the hoard, the board may retain special counsel which shall he paid for out of the appropriation under s.20.165 (1) (g).

History: 1985 a. 340; 1993 a. 107.

SUBCHAPTER II
PRIVATE DETECTIVES, PRIVATE SECURITY PERSONS

440.26 Private detectives, investigators and security personnel; licenses and permits. **(1)** LICENSE OR PERMIT REQUIRED. (a) No person may do any of the following unless he or she has a license or permit issued under this section:

1. Advertise, solicit or engage in the business of operating a private detective agency.

2. Act as a private detective, investigator, special investigator or private security person.

3. Act as a supplier of private security personnel.

4. Solicit business or perform any other type of service or investigation as a private detective or private security person.

11. Receive any fees or compensation for acting as any person, engaging in any business or performing any service specified in suhds.1. to 4.

(h) The department may promulgate rules specifying activities in which a person may engage without obtaining a license or permit under this section.

(1m) DEFINITION. In this section: (h) "Private security oerson" or "private security personnei" means any private police; guard or any person who stands watch for security purposes.

(2) TYPES OF LICENSES; APPLICATION; APPROVAL. (a) *Types* of licenses. The department may do any of the following:

1. Issue a private detective agency license to an individual, partnership, limited liability company or corporation that meets the qualifications specified under par. (c). The department may not issue a license under this subdivision unless the individual or each member of the partnership or limited liability company or officer or director of the corporation who is actually engaged in the work of a private detective is issued a private detective license under this section.

2. Issue a private detective license to an individual who meets the qualifications specified under par. (c) if the individual is an owner, co-owner or employee of a private detective agency required to he licensed under this section.

(b) Applications. The department shall prescribe forms for original and renewal applications. A partnership or limited liability company application shall be executed by all members of the partnership or limited liability company. A corporate application shall be executed by the secretary and the president or vice president and, in addition, in the case of a foreign corporation, by the registered agent.

(c) ***Approval*** 1. Subject to subds. 2. and 3., the department shall prescribe, by rule, such qualifications as it deems appropriate, with due regard to investigative experience, special professional education and training and other factors hearing on professional competence.

2. An individual who has been convicted in this state or elsewhere of a felony and who has not been pardoned for that felony is not eligible for a license under this section.

3. The department may not issue a license under this section to an individual unless the individual is over 18 years of age.

4. The department, in considering applicants for **license, shall** seek the advice of the appropriate local law enforcement agency or governmental official, and conduct such further investigation, as it deems proper to determine the competence of the applicant.

(3) ISSUANCE OF LICENSES; FEES. Upon receipt and examination of an application executed under sub. (2), and after any investigation that it considers necessary, the department shall, if it determines that the applicant is qualified, grant the proper license upon payment of the fee specified in s. 440.05 (1). No license shall he issued for a longer period than 2 years, and the license of a private detective shall expire on the renewal date of the license of the private detective agency, **even** if the **license** of the private detective has not been in effect for a full 2 years. Renewals of the original licenses issued under this section shall be issued in accordance with renewal forms prescribed by the department and shall he accompanied by the fees specified in s. 440.08. The department may not renew a license unless the applicant provides evidence that the applicant has in force at the time of renewal the bond or liability policy specified in this section.

(3m) RULES CONCERNING DANGEROUS WEAPONS. The department shall promulgate rules relating to the carrying of dangerous weapons by a person who holds a license or permit issued under this section or who is employed by a person licensed under this section. The rules shall meet the minimum requirements specified in 15 USC 5902 (b).

(4) BONDS OR LIABILITY POLICIES REQUIRED. No license may he issued under this section until a bond or liability policy, approved by the department, in the amount of $100,000 if the applicant for the license is a private detective agency and includes all principals, partners, members or corporate officers, or in the amount of 62,000 if the applicant is a private detective, has been executed and filed with the department. Such bonds or liability policies shall be furnished by an insurer authorized to do a surety business in this state in a form approved by the department.

(4m) REPORTING VIOLATIONS OF LAW. (a) Definition. In this subsection, "violation" means a violation of any state or local law that is punishable by a forfeiture.

(b) Reporting requirement. A person who holds a license or permit issued under this section and who is convicted of a felony

or misdemeanor, or is found to have committed a violation, in this state or elsewhere, shall notify the department in writing of the date, place and nature of the conviction or finding within 48 hours after the entry of the judgment of conviction or the judgment finding that the person committed the violation. Notice may be made by mail and may be proven by showing proof of the date of mailing the notice.

(5) EXEMPTIONS. (a) The requirement that a person acting as a private detective, investigator or special investigator be licensed under this section does not apply to attorneys, law students or law school graduates employed by an attorney or persons directly employed by an attorney or firm of attorneys whose work as private detective, investigator or special investigator is limited to such attorney or firm or to persons directly employed by an insurer or a retail credit rating establishment. A person who accepts employment with more than one law firm shall be subject to the licensing provisions of this section.

(b) The license requirements of this section do not apply to any person employed directly or indirectly by the state or by a municipality, as defined in s. 345.05 (1) (c), or to any employee of a railroad company under s. 192.47, or to any employee of a commercial establishment, while the person is acting within the scope of his or her employment and whether or not he or she is on the employer's premises(c) An employee of any agency that is licensed as a private detective agency under this section and that is doing business in this state as a supplier of uniformed private security personnel to patrol exclusively on the private property of industrial plants, business establishments, schools, colleges, hospitals, sports stadiums, exhibits and similar activities is exempt from the license requirements of this section while engaged in such employment, if all of the following apply:

1. The employee obtains a private security permit under this sub. (5m).

2. The private detective agency furnishes an up-to-date written record of its employees to the department. The record shall include the name, residence address, date of birth and a physical description of each employee together with a recent photograph and 2 fingerprint cards bearing a complete set of fingerprints of each employee.

3. The private detective agency notifies the department in writing within 5 days of any change in the information under suhd.2, regarding its employees, including the termination of employment of any person.

(5m) PRIVATE SECURITY PERMIT. (a) The department shall issue a private security permit to an individual if all of the following apply:

1. The individual submits an application for a private security permit to the department on a form provided by the department.

2. The individual has not been convicted in this state or elsewhere of a felony, unless he or she has been pardoned for that felony.

3. The individual provides evidence satisfactory to the department that he or she is an employee of a private detective agency described in sub. (5) (c).

4. The individual pays to the department the fee specified in s. 440.05 (1).

(b) The renewal dates for permits issued under this subsection are specified under s. 440.08 (2) (a). Renewal applications shall be submitted to the department on a form provided by the department and shall include the renewal fee specified in s. 440.08 **(2)** *(a)*.

(c) A private security permit issued under this subsection authorizes the holder of the permit to engage in private security activities described in sub. *(5)* (c) for an employer described in sub. (5) (c) anywhere in this state.

(d) The department shall maintain a record pertaining to each applicant for a permit under this subsection and each holder of a permit issued under this subsection. The record shall include all information received by the department that is relevant to the approval or denial of the application, the issuance of the permit and any limitations, suspensions or revocations of the permit.

(5r) TEMPORARY PRIVATE SECURITY PERMIT. (a) The department shall issue a temporary private security permit to an individual at the request of the individual if all of the following apply:

1. The individual has completed an application and provided information required under sub. (5m) (a).

2. The department is not yet able to grant or deny the individual's application because a background check of the individual is not complete.

(b) 1. Except as provided in subd.2., an individual who has been issued a temporary private security permit under par. (a) may act as a private security person in the same manner as an individual issued a private security permit under sub. (5m).

2. An individual may not carry a dangerous weapon while acting as a private security person under a temporary private security permit issued under par. (a).

(c) 1. Except as provided in subd.2., a temporary private security permit issued under par. (a) is valid for 30 days.2. A temporary private security permit issued under par. (a) shall expire on the date that the individual receives written notice from the department that a background check of the individual has been completed and that the department is granting or denying the individual's application for a private security permit, if that date occurs before the end of the period specified in subd.1

3. A temporary private security permit issued under par. (a) may not be renewed.

(6) DISCIPLINE. (a) Subject to the rules adopted under s. 440.03 (1), the department may reprimand the holder of a license or permit issued under this section or revoke, suspend or limit the license or permit of any person who has done any of the following:

1. Been convicted of a misdemeanor or found to have violated any state or local law that is punishable by a forfeiture, subject to ss. 111.321, 111.322 and 111.335.

2. Engaged in conduct reflecting adversely on his or her professional qualification.

3. Made a false statement in connection with any application for a license or permit under this section.

4. Violated this section or any rule promulgated or order issued under this section.

(b) Subject to the rules promulgated under s. 440.03 (1), the department shall revoke the license or permit of any person who has been convicted of a felony in this state or elsewhere and who has not been pardoned for that felony.

***(8)* PENALTIES.** Any person, acting as a private detective, investigator or private security person, or who employs any person who solicits, advertises or performs services in this state as a private detective or private security person, or investigator or special investigator, without having procured the license or permit required by this section, may be fined not less than $100 nor more than $500 or imprisoned not less than 3 months nor more than *6* months or both. Any agency having an employee, owner, officer or agent convicted of the above offense may have its agency license revoked or suspended by the department. Any person convicted of the above offense shall be ineligible for a license for one year.

History: 1971 c. 213 s. 5; 1977 c. 29, 125, 418; 1979 c. 102 ss. 45, 236 (3); 1981 c. 334 s. 25 (1); 1981 c. 380, 391; 1983 a. 189 s. 329 (31); 1983 a. 273; 1985 a. 128,135; 1991 a. 39, 269; 1993 a. 112, 213; 1995 a. 461; 1997 a. 27; 1999 a. 32

Cross-reference: *See* s. 134.51 for requirement that all settlements made with an employee or fiduciary agent, where the detective is to be paid a percentage of the amount recovered, must be submitted to the circuit court for approval.

Cross reference: See also chs. RL 30, 31, 32, 33, 34, and 35, Wis. adm. code.

Police officers working as private security persons are subject to the same licensing provisions in this section as are non-police officers. 69 Atty. Gen. 226. This section does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. 76 Atty. Gen. 35.

799.05 Summons. (1) CONTENTS. The summons shall state the nature of the demand substantially in the terms of one or more of the provisions of s. 799.01, and, except as provided in ss. 806.30 to 806.44, the dollar amount of damages, if any, the last–known address of the parties and the name, state bar number, if any, address and telephone number of plaintiff's attorney, if any. The caption shall include the standardized description of the case classification type and associated code number as approved by the director of state courts.

(2) SIGNING. The process shall be signed by the clerk or by any attorney duly authorized to practice law in this state and shall he issued by the clerk only to a person authorized to appear under s. 799.06 (2), and not otherwise.

(3) RETURN DATE. (a) Every summons shall specify a return date and time.

(b) Except in eviction actions, the return date for a summons served upon a resident of this state shall be not less than 8 days nor more than 30 days from the issue date, and service shall be made not less than 8 days prior to the return date. In eviction actions, the return date for a summons served upon a resident of this state shall be not less than 5 days nor more than 30 days from the issue date, and service shall he made not less than 5 days prior to the return date.

(c) The return date for a summons served upon a nonresident of this state shall be not less than 20 days from the issue date.

(d) The clerk shall set the day and hour at which the summons is returnable.

(4) CLERK TO FURNISH TIME OF RETURN. If a summons is signed by an attorney, the attorney shall obtain from the clerk of court the hour and date within the limits of sub. (3) on which to make the summons returnable.

(5) NOTING DATE OF MAILING. After a copy of the summons has been mailed, the clerk shall note the date of mailing on the original.

(6) FORM. Except as provided in s. 799.22 (4) (b) 3., the summons shall he substantially in the following form:

STATE OF WISCONSIN **CIRCUIT COURT**
County

A. B.
Address
City, State Zip Code
File No. ....
,Plaintiff
vs.
S U M M O N S – SMALL CLAIMS
C. D.
Address
... (Case Classification Type): ....(Code No.)
City, State Zip Code
,Defendant

THE STATE OF WISCONSIN, to the Defendant:

You are hereby summoned to appear and plead to the Plaintiffs complaint in the above court at .... in the (city) (village) of ...., on the ....day of ...., ...(year), at .... o'clock (a.m.) (p.m.). [A copy of the complaint is hereto attached.] [The Plaintiff will state his or her demand on that date.] In case of your failure to appear, a judgment may he rendered against you in accordance with the demands made by the Plaintiff. The nature of the demand being made upon you is ....(state in terms of s. 799.01 of the Wisconsin Statutes) and the amount of damages, if any, demanded is .....

Dated: ...., ...(year)
Signed: ....
E. F., Clerk of Circuit Court
or
G. H., Plaintiffs Attorney
State Bar No.: ....
Address: ....
City, State Zip Code: ....
Phone No.: ....

(7) FORM CIRCUIT COURT COMMISSIONER. Except as provided in s. 799.22 (4) (b) 3., in counties in which a circuit court commissioner is assigned to assist in small claims matters, the summons shall he substantially in the following form:

STATE OF WISCONSIN **CIRCUIT COURT:**
COUNTY

A. B.
Address
City, State Zip Code
File No.
. ... ,Plaintiff
vs.
S U M M O N S (SMALL CLAIMS)
C.D.
Address
City, State Zip Code
Defendant

THE STATE OF WISCONSIN, to the Defendant:

You are being sued for: .... Eviction .... Return of Property .... Confirmation, vacation, modification or correction of arbitration award .... $..... If you wish to dispute this matter, you must then be in Room...., of the .... (County) County Courthouse, ... (address), ... (city), Wisconsin before .... o'clock (a.m.) (p.m.), on ...., ...(year) If you do not appear, a judgment may be given to the person suing you for what that person is asking. You are encouraged to bring with you all papers and documents relating to this matter, but there is no need to bring witnesses at this time. Dated at .... County, Wisconsin, this .... day of ...., ... (year)

Signed: ....
E. F., Clerk of Circuit Court
or
G. H., Plaintiffs Attorney
State Bar No.: ....
Address: ....
City, State Zip Code: ....
Phone No.: ....

History: 1977 c. **345;** 1977 c. **449** s. 497; 1979 c. 32 ss. 66.92 (16); 1979 c. 108; 1979 c. 176 s. 85; 1979 c. 177 s. 85; Stats. 1979 s. 799.05; **Sup. Ct. Order,** 130 **Wis.** 2d xi; 1987 **a. 142. 208, 403;** 1989 **a. 56: 1991 a.** 163,236; **Sup. Ct. Order,** 171 Wis. 2d xix (1992); 1993 a. 80; 1997 a. 250; 2001 a. 61.

Judicial Council Note, 1986: **Sub.** (3) is **amended** by extending from **17 to 30 days the period between the** issuance **of the** summons **and** the return **date,** in order **to** permit timely service **on defendants who are** not residents **of the** county where **the action** is pending. **[Re** Order **eff.** 7–1–86]

CHAPTER 801
CIVIL PROCEDURE — COMMENCEMENT OF ACTION AND VENUE

NOTE: Chapter 801 was created by Sup. Ct. Order, 67 Wis. 2d 585 (1975), which contains

Judicial Council Committee notes explaining each section. Statutes prior to the 1983–84 edition also have these notes.

801.03 Jurisdiction; definitions. In this chapter, the following words have the designated meanings:

(1) "Defendant" means the person named as defendant in a civil action, and where in this chapter acts of the defendant are referred to, the reference attributes to the defendant any person's acts for which acts the defendant is legally responsible. In determining for jurisdiction purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

(2) "Person" means any natural person, partnership, association, and body politic and corporate.

(3) "Plaintiff" means the person named as plaintiff in a civil action, and where in this chapter acts of the plaintiff are referred to, the reference attributes to the plaintiff the acts of an agent within the scope of the agent's authority.

History: Sup. Ct. Order, 67 Wis. 2d 585, 591 (1975); 1975 c. 218; 1983 a. 189.

Illegal aliens have the right to sue in Wisconsin for injuries negligently inflicted upon them. Arteaga v. Literski, 83 Wis. 2d 128, 265 N.W.2d 148 (1978).

801.10 Summons, by whom served. (1) WHO MAY SERVE. An authenticated ɐopʇ of the summons *nəʇ* bɐ served by ənp adult resident o ɟıbɐ state where service is ɯədɐ who is not ə party to the action. Service shall bɐ ɯədɐ with reasonable diligence.

(2) ENDORSEMENT. At the time of service, the pɐıson who serves a ɐopʇ of the summons shall sign the summons ənd shall indicate thereon the time and dɑıɐ, place ənd manner of service ənd upon whom service was nədɐ, If the server is a sheriff or deputy sheriff, the server's official title shall be stated. Failure to **nəʌɐ** the endorsement shall not invalidate ə service but the server shall not collect fees for the service.

(3) PROOF OF SERVICE. The pɐıson making service shall make and deliver proof of service to the pɐıson on ɯbosɐ behalf service was ɯədɐ who shall promptly file such proof of service. Failure to **nəʌɐ**, deliver, or file proof of service shall not affect the validity of the service.

(d) PROOF IF SERVICE CHALLENGED. If the defendant appears in the action and challenges the service of summons upon the defendant, proof of service shall bɐ as follows:

(ə) Personal or substituted personal service shall bɐ proved by the affidavit ǫƐ the server indicating the time and dɑıɐ, place and manner of service, *ıbəı* the server is an adult resident of the state of service not a party *ıo* the action, that the server knew the pɐıson served to bɐ the dɐ[ɐndənı named in the summons ənd that the server delivered to and left with the defendant an authenticated copy of the summons. If the defendant is not personally served, the server shall **sıəıɐ** in the affidavit when, where and with whom the ɐopʇ was left, and shall state sueb facts əs sbou reasonable diligence in attempting to effect personal service on the defendant. If the copy of the summons is served by a sheriff or deputy sheriff of the county in this state where the dɐ[ɐndənı was found, proof may bɐ by the sheriff's or deputy's certificate of service indicating time and dəıɐ, place, manner of service and, if the defendant is not personally served, the information required in the preceding sentence. The affidavit or certificate constituting proof ǫƐ service under this paragraph may bɐ ɯədɐ on an authenticated ɐopʇ of the summons or as a separate document.

(b) Service by publication shall ⊬ɐ proved by the affidavit of the publisher or printer, or the foreman or principal clerk, stating that the summons was published and specifying the dəıɐ ǫƐ each insertion, and by ən affidavit of mailing ǫƐ ən authenticated copy ǫƐ the summons, with the complaint or notice of the object of the action, as the case may require, made by the person who mailed the same.

(ɐ) The written admission of the defendant, whose signature or the subscription ǫƐ whose name to sueb admission shall bɐ presumptive evidence of genuineness.

History: Sup. Ct. Order, 67 Wis. 2d 585, 600 (1975); 1975 c. 218; Sup. Ct. Order, 92 Wis. 2d xiii (1979).

Judicial Council Committee's Note, 1979: Sub.(2) is amended to clarify that the individual who serves the summons on behalf of the plaintiff under the procedures in the Wisconsin Rules of Civil Procedure must indicate on the copy of the summons served both the time and date of service. There is presently a lack of uniformity of interpretation in Wisconsin of the term "time" in 801.10 (2).

Some jurisdictions interpret it to include time and date of service while other jurisdictions interpret it as only the date of service. Clarifying that both the time and date of service must be indicated in the serving of the summons will insure that this potentially valuable information is noted on the served copy of every summons in Wisconsin.

Sub.(4) (a) is amended to also apply the requirement for indicating time and date of service to the affidavits and certificates of service used when proof of service is challenged. [Re Order effective Jan. 1, 1980]

A party is required to show strict compliance with the requirements of this section when service is challenged. Dietrich v. Elliot, 190 Wis. 2d 816, 528 N.W.2d 17 (Ct. App. 1995).

Service by a nonresident constitutes a fundamental defect compelling dismissal for lack of jurisdiction. Bendimez v. Neidermire, 222 Wis. 2d 356, 588 N.W.2d 55 (Ct. App. 1998).

Sub.(4) does not require the affiant to have first hand knowledge of how the documents were authenticated, nor does it require that the affiant's statements must be unqualified; it requires that the affiant affirm that an authenticated copy of the summons was served. State v. Boyd, 2000 WI App 208, 238 Wis. 2d 693, 618 N.W.2d 251.

801.11 Personal jurisdiction, manner of serving summons for. A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction əs provided in s. 801.05 *nəʇ* exercise personal jurisdiction over a defendant by service of a summons as follows:

(1) NATURAL PERSON. Except as provided in sub.(2) upon a natural person:

(ə) By personally serving the summons upon the dɐ[ɐndənı either within or without this state.

(b) If with reasonable diligence the dɐ[ɐndənı cannot bɐ served undeı par.(a), then by leaving a copy ǫƐ the summons at the defendant's usual place of abode:

1. In the presence ǫƐ some competent member of the family at least 14 years of age, who shall bɐ informed of the contents thereof; 1m. In the presence of a competent adult, currently residing in the əbodɐ ǫƐ the defendant, who shall bɐ informed of the contents of the summons; or

2. Pursuant to the law for the substituted service of summons or like process upon defendants in actions brought in courts of general jurisdiction of the state in which service is ɯədɐ,

(ɐ) If with reasonable diligence the defendant cannot bɐ served undeı par.(a) or (b), service may bɐ nədɐ by publication ǫƐ the summons as ə class 3 notice, undeı ɐd, 985, and ***bʇ*** mailing. If the defendant's post–office address is known or can with reasonable diligence bɐ ascertained, there shall bɐ mailed to the dɐ[ɐndənı, at or immediately prior ıo the first publication, a ɐopʇ ǫƐ the summons and a copy ǫƐ the complaint. The mailing *nəʇ* be omitted if the post–office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

(2) NATURAL PERSON UNDER DISABILITY. Upon a natural pɐıson undeı disability by serving the summons in any manner prescribed in sub.(1) upon sueb pɐıson undeı disability and, in addition, where required by par.(a) or (b), upon a pɐıson therein designated. A minor 14 years of age or older who is not mentally incompetent

and not otherwise under guardianship is not a person under disability for purposes of this subsection.

(a) Where the person under disability is a minor under the age of 14 years, summons shall be served separately in any manner prescribed in sub.(1) upon a parent or guardian having custody of the child, or if there is none, upon any other person having the care and control of the child. If there is no parent, guardian or other person having care and control of the child when service is made upon the child, then service of the summons shall also be made upon the guardian ad litem after appointment under s. 803.01

(b) Where the person under disability is known by the plaintiff to be under guardianship of any kind, a summons shall he served separately upon the guardian in any manner prescribed in sub.(1), (5) or (6). If no guardian has been appointed when service is made upon a person known to the plaintiff to he incompetent to have charge of the person's affairs; then service of the summons shall he made upon the guardian ad litem after appointment under s. 803.01.

(3) STATE. Upon the state, by delivering a copy of the summons and of the complaint to the attorney general or leaving them at the attorney general's office in the capitol with an assistant or clerk.

(4) OTHER POLITICAL CORPORATIONS OR BODIES POLITIC.

(a) Upon a political corporation or other body politic, by personally serving any of the specified officers, directors, or agents:

1. If the action is against a county, the chairperson of the county hoard or the county clerk;
2. If against a town, the chairperson or clerk thereof;
3. If against a city, the mayor, city manager or clerk thereof;
4. If against a village, the president or clerk thereof;
5. If against a technical college district, the district board chairperson or secretary thereof;
6. If against a school district or school hoard, the president or clerk thereof and
7. If against any other body politic, an officer, director, or managing agent thereof.

(b) In lieu of delivering the copy of the summons to the person specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

(5) DOMESTIC OR FOREIGN CORPORATIONS OR LIMITED LIABILITY COMPANIES, GENERALLY, Upon a domestic or foreign corporation or domestic or foreign limited liability company:

(a) By personally serving the summons upon an officer, director or managing agent of the corporation or limited liability company either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the ofiice.

(b) If with reasonable diligence the defendant cannot be served under par.(a), then the summons may he served upon an ofiicer, director or managing agent of the corporation or limited liability company by publication and mailing as provided in sub.(1).

(c) By serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

(d) If against any insurer, to any agent of the insurer as defined by s. 628.02. Service upon an agent of the insurer is not valid unless a copy of the summons and proof of service is sent by registered mail to the principal place of business of the insurer within 5 days after service upon the agent. Service upon any insurer may also he made under par.(a).

(6) PARTNERS AND PARTNERSHIPS. A summons shall he served individually upon each general partner known to the plaintiff by service in any manner prescribed in sub.(1), (2) or (5) where the claim sued upon arises out of or relates to partnership activities within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05 (2) to (10). A judgment rendered under such circumstances is a binding adjudication individually against each partner so served and is a binding adjudication against the partnership as to its assets anywhere.

History: *Sup.* Ct. Order, 67 Wis. 2d 585,602 (1975); 1975 c. 218; 1977 c. 339 s. 43; 1979 c. 89, 102, 177; 1983 a. 192 s. 303 (2); 1985 a. 225; Sup. Ct. Order, 130 Wis. 2d xix (1986); 1993 a. 112, 184, 265, 399, 491; 1997 a. 140; 1999 a. 32.

Cross-reference: As to service on corporation, see also s. 180.0504.

Judicial Council Note, 1986: Sub.(1) (b) is amended to permit substituted service upon residents of other states. Service upon nonresidents may be made either as provided for Wisconsin residents or in accordance with the substituted service rule of the state wherein service is made. [Re Order eff. 7-1-86]

There is no requirement in cases of substituted service that the affidavit recite that the process server used "reasonable diligence" in attempting to make personal service, but substituted service after 2 calls when the defendant was not found, with no effort to learn where he was, was not sufficient to support jurisdiction. Heaston v. Austin, 47 Wis. 2d 67, 176 N.W.2d 309 (1970).

When a village is a defendant, service is void if it is made upon the clerk's spouse in the clerk's absence. Town of Washington v. Village of Cecil, 53 Wis. 2d 710, 193 N.W.2d 674 (1972).

"Apparently in charge of the office" in sub.(5) (a) refers to what is apparent to the process server. When a receptionist referred the process server to her superior, who did not send the server to the proper office, the server could serve him, particularly since the superior had accepted service of process in other actions without objection by the company. Keske v. Square D Co. 58 Wis. 2d 307, 206 N.W.2d 189 (1973).

When personal jurisdiction is challenged under the "long arm" statutes, the burden is on the plaintiff to prove prima facie the facts supporting jurisdiction. A plaintiff who relies on sub.(5) is required to establish as a predicate that the defendant entered into some consensual agreement with the plaintiff that contemplated a substantial contact in Wisconsin. Afram v. Balfour, Maclaine, Inc. 63 Wis. 2d 702, 218 N.W.2d 288 (1974).

No presumption of due service was raised when an affidavit of service under sub.(5) (a) did not identify the person served as the one specified in sub.(5) (a). Danielson v. Brody Seating Co. 71 Wis. 2d 424, 238 N.W.2d 531 (1976).

The prerequisite "due diligence" for service by publication was not established, despite the sheriff's affidavit, when a husband could have ascertained his wife's address by contacting any one of several relatives or in-laws. West v. West, 82 Wis. 2d 158, 262 N.W.2d 87 (1978).

A county civil service commission is a "body politic" under sub.(4) (a) 7. Watkins v. Milwaukee County Civil Service Comm. 88 Wis. 2d 411, 276 N.W.2d 775 (1979).

The exact identity and job title of the person upon whom service was made was not critical to whether the person was "apparently in charge of office" under sub.(5) (a). Horrigan v. State Farm Ins. Co. 106 Wis. 2d 675, 317 N.W.2d 474 (1982).

"Reasonable diligence". under sub.(1) is discussed. Welty v. Heggy, 124 Wis. 2d 318, 369 N.W.2d 763 (Ct. App. 1985).

Indian tribal sovereignty is not infringed by service of process in a state action made on tribal lands. Landerman v. Martin, 191 Wis. 2d 788, 530 N.W.2d 62 (Ct. App. 1995).

Service of process on some of the partners in a general partnership is sufficient to properly commence a civil action against the partnership that will be binding on the partnership assets and the partners served. CH2M Hill, Inc. v. Black & Veatch, 206 Wis. 2d 369, 557 N.W.2d 829 (Ct. App. 1996).

The existence of a parent-subsidiary corporate relationship does not automatically establish the subsidiary as an agent of the parent for purposes of receiving process. Prom v. Sumitomo Rubber Industries, Ltd. 224 Wis. 2d 743, 592 N.W.2d 657 (Ct. App. 1999).

A corporation whose offices were located on the 23rd floor of an office building was not properly served under sub.(5) (a) when the papers were left with a security guard in the building lobby who stated that he was authorized to accept service. Bar Code Resources v. Ameritech, Inc. 229 Wis. 2d 287, 599 N.W.2d 872 (Ct. App. 1999).

Admission of service by an assistant attorney general or a clerk specifically designated for that purpose by the attorney general will constitute service of process within the meaning of (3). 63 Atty. Gen. 467.

Service an a nonresident defendant's father at the father's residence was insufficient for exercise of personal jurisdiction over the nonresident, despite claimed actual notice, when no attempt was made to comply with s. 345.09. Chilcote v. Shertzer, 372 F. Supp. 86 (1974).

801.14 Service and filing of pleadings and other papers.

(1) Every order required by its terms to he served, every pleading unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to he served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, undertaking, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall he served upon them in the manner provided for service of summons in s. 801.11.

(2) Whenever under these statutes, service of pleadings and other papers is required or permitted to he made upon a party represented by an attorney, the service shall he made upon the attorney unless service upon the party in person is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing it to the last-known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this section means: handing it to the attorney or to the party; transmitting a copy of the paper by facsimile machine to his or her office; or leaving it at his or her ofiice with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to he served has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by facsimile is

complete upon transmission. The first sentence of this subsection shall not apply to service of a summons or of any process of court or of any paper to bring a party into contempt of court.

(3) In any action in which there are unusually large numbers of defendants, the court, upon motion or on its **own** initiative, may order that service of the pleadings of the defendants and replies thereto need not he made as between the defendants and that any cross–claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. **A** copy of every such order shall be served upon the parties in such manner and form as the court directs.

(4) All papers after the summons required to be served upon **a** party, except as provided in s. 804.01 (6), shall be filed with the court within a reasonable time after service. The filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served, except **as** the person effecting the filing may otherwise stipulate in writing.

(6) If an action pertaining to the subject matter of the compact authorized under s. 304.16 may affect the powers, responsibilities, or actions of the interstate commission, as defined in s. 304.16 (2) (f), the plaintiff shall deliver or mail a copy of the complaint to the interstate commission at its last–known address.

History: Sup. Ct. Order, 67 Wis. 2d 585, 607 (1975); 1975 c. 218; Sup. Ct. Order, 130 Wis. 2d xix (1986); Sup. Ct. Order, 161 Wis. 2d xvii (1991); 2001 a. 96.

Judicial Council Note, 1986: Sub.(4) is amended by insertion of a cross–reference to s. 804.01 (6), providing that discovery documents need not be filed with the court unless the court so orders. [Re Order eff. 7–1–86]

Judicial Council Note, 1991: Sub.(2) is amended to clarify that facsimile transmission can be used to serve pleadings and other papers. Such service is deemed complete upon transmission. The change is not intended to expand the permissible means of serving a summons or writ conferring court jurisdiction under s. 799.12 and ch. 801, stats. [Re Order eff. 7–1–91]

Once an action has been commenced, service of the summons and complaint has been made on the defendant, and an attorney has appeared on behalf of the defendant, an amended complaint may be served on the defendant's attorney. Bell v. Employers Mutual Casualty Co. 198 Wis. 2d 347, 541 N.W.2d 824 (Ct. App. 1995).

A motion to dismiss with prejudice cannot be heard ex parte and should be granted only on finding egregious conduct or bad faith. Failure to obtain personal service with due diligence does not amount to egregious conduct or bad faith. *Haselow v. Gauthier*, 212 Wis. 2d 580, 569 N.W.2d 97 (Ct. App. 1997).

An amended complaint that makes no reference to or incorporates any of the original complaint supercedes the original complaint when the amended complaint is filed in court. When such a complaint was filed prior to the time for answering the original complaint had run, it was improper to enter a default judgment on the original complaint. Holman v. Family Health Plan, 227 Wis. 2d 478, 596 N.W.2d 358 (1999).

A party in default for failing to answer an original complaint cannot answer an amended complaint, thereby attempting to cure its default, unless the amended complaint relates to a new or additional claim for relief. Ness v. Digital Dial Communications, Inc. 227 Wis. 2d 592.596 N.W.2d 365 (1999).

A receptionist who accepted the receipt of pleadings delivered to an attorney's office by a delivery service was a person in charge of the office within the meaning of sub.(2), and the papers had been properly "delivered? Varda v. General Motors Corporation, 2001 WI App 89,242 Wis. 24 756, 626 N.W.2d 346.

A circuit court may not enter a default judgment against a defendant on grounds that the defendant failed to file an answer with the court "within a reasonable time after service" under sub.(4) unless the court first determines that the late filing prejudiced either the plaintiff or the court. Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc. 2002 WI 66,253 Wis. 2d 238,646 N.W.2d 19.

CHAPTER 885
WITNESSES AND ORAL TESTIMONY
SUBCHAPTER I
GENERAL PROVISIONS

885.01 Subpoenas, who may issue. The subpoena need not he sealed, and may he signed and issued as follows:

(1) By any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

(2) By the attorney general or any district attorney or person acting in his or her stead, to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate and from any part of the state.

(3) By the chairperson of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof.

(4) By any arbitrator, coroner, medical examiner, hoard, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission, authority or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection.

(5) By the department of workforce development or a county child support agency under s. **59.53** *(5)* in the administration of ss. **49.145, 49.19, 49.22, 49.46** and **49.47** and programs carrying out the purposes of 7 USC **2011** to **2029.**

History: 1971 c. 164; **1973 c. 272,305,336; 1977 c. 29 s.** 1650m (4); 1977 **c.** 305; **1979 c. 34: 1989 a. 56: 1993 a. 486 1997 a.** 191.

Cross–reference: See s. 805.07 **concerning** issuance **of** subpoenas **by** attorneys **of record A taxpayer subpoenaed by the** department **of revenue has** limited **discovery rights. Sate** v. Beno, **99** Wis. 2d **77, 298** N.W.2d **405 (Ct.** App. **1980).**

A school board **may** issue **a subpoena** to **compel the** attendance of **a witness at** an expulsion **hearing.** Racine Unified **School** District v. **Thompson, 107** Wis. 2d **657, 321** N.W.2d **334** (Ct. App. **1982).**

A subpoenaed witness must **attend a continued** or postponed hearing **and** remain **in** attendance until excused. **68** Atty. Gen. **251.**

885.02 Form of subpoena. (1) The subpoena may be in the following form:

SUBPOENA

STATE OF WISCONSIN

.... County

THE **STATE** OF **WISCONSIN.**

To ....:

You are hereby required to appear before .... (designating the court, officer or person and place of appearance), on the .... day of ...., at .... o'clock in the .... noon of that day, to give evidence in a certain cause then and there to be tried between ...., plaintiff, and ...., defendant, on the part of the .... (or to give evidence in the matter [state sufficient to identify the matter or proceeding in which the evidence is to be given] then and there to he heard, on the part of ....). Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions. Given under my hand this .... day of ...., ... (year) ....(Give official title)

(2) For a subpoena requiring the production of materials, the following or its equivalent may be added to the foregoing form (immediately before the attestation clause): and you are further required to bring with you the following papers and documents (describing them as accurately as possible).

History: 1977 c. 305; 1979 c. 110; 1985 a. **332;** 1987 a. 155; **1997 a. 250**

885.03 Service of subpoena. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

History: 1993 a 486.

885.11 Disobedient witness. (1) DAMAGES RECOVERABLE. If any person obliged to attend as a witness shall fail to do so without any reasonable excuse, the person shall be liable to the aggrieved party for all damages occasioned hy such failure, **to be** recovered in an action.

(2) ATTENDANCE COMPELLED. Every court, in case of unexcused failure to appear before it, may issue an attachment to bring such witness before it for the contempt, and also to testify.

(3) PUNISHMENT IN COURTS. Inexcusable failure **to** attend any court of record is a contempt of the court, punishable by a fine not exceeding **$200.**

(4) SAME. Unexcused failure to attend a court not of record shall he a contempt, and the witness shall be fined all the costs of the witness's apprehension, unless the witness shall show reasonable cause for his or her failure; in which case the party procuring the wimess to be apprehended shall pay said costs.

(5) STRIKING OUT PLEADING. If any party to an action or proceeding shall unlawfully refuse or neglect to appear or testify or depose therein, either within or without the state, the court may, also, strike out the party's pleading, and give judgment against the party as upon default or failure of proof.

History: 1987 a 155; **1993 a.** 486.

Cross–reference: See also s. **804.12 (4) regarding failure** to appear **at deposition. Sub. (5) is broad enough** to **include the failure to produce** documents **at** a discovery examination, **but** a party cannot **delay 7 years before** making **the motion to** strike **the pleading.**

"Unlawfully" **means** without **legal excuse, and this** must be determined **at a hearing.** Gipson **Lumber Co.** v. Schickling, **56** Wis. **2d 164, 201** N.W.2d 500 **(1972).**

The trial court **did** not abuse **its discretion in dismissing a plaintiffs complaint** for failure to **comply** with **a discovery** order. Furrenes v. **Ford** Motor **Co. 79** Wis. 2d 260, 255 N.W.2d 511 **(1977).**

885.12 Coercing witnesses before officers and boards. If any person, without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony, or to produce a book or paper which the person was lawfully directed to bring, or to subscribe the person's deposition when correctly reduced to writing, any judge of a court of record or a circuit court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for the person, and unless the person shall purge the contempt and go and testify or do such other act as required by law, may commit the person to close confinement in the county jail until the person shall so testify or do such act, or he discharged according to law. The sheriff of the county shall execute the commitment.

History: 1973 c. 212; 1993 a. 486; 2001 a. 61

Cross–reference: See s 785.06.

885.365 Recorded telephone conversation. (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state in civil actions, except as provided in ss. **968.28** to **968.37.**

(2) Subsection (1) shall not apply where: (a) Such recording is made in a manner other than by interception and the person whose

conversation is being recorded is informed at that time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law; or such recording is made through a recorder connector provided by the telecommunications utility as defined in s. 196.01 (10) or a telecommunications carrier as defined in s. 196.01 (8m) in accordance with its tariffs and which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds;

(b) The recording is made by a telecommunications utility as defined in s. 196.01 (10), a telecommunications carrier as defined in s. 196.01 (8m) or its officers or employees for the purpose of or incident to the construction, maintenance, conduct or operation of the services and facilities of such public utilities, or to the normal use by such public utilities of the services and facilities furnished to the public by such public utility; or

(c) The recording is made by a fire department or law enforcement agency to determine violations of, and in the enforcement of, s. 941.13.

History: 1971 c. 40 s. 93; 1977 c. 173 s. 168; 1985 a. 297; 1987 a. 399; 1993 a. 496.

CHAPTER 904
EVIDENCE — RELEVANCY AND ITS LIMITS

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

904.01 Definition of "relevant evidence". "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

History: Sup. Ct. Order, 59 Wis. 2d R1, R66 (1973).

Evidence of a defendant's expenditure of money shortly after a burglary was properly admitted. State v. Heidelbach, 49 Wis. 2d 350, 182 N.W.2d 497 (1971).

The difference between relevancy and materiality is discussed. If counsel fails to state the purpose of a question objected to on grounds of immateriality, the court may exclude the evidence. State v. Becker, 51 Wis. 2d 659, 188 N.W.2d 449 (1971).

The introduction of a portion of a bloodstained mattress was both relevant and material by tending to make more probable the prosecution's claim that the victim had been with the defendant and had been molested by him. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).

The most important factor in determining the admissibility of evidence of conduct prior to an accident is the degree of probability that the conduct continued until the accident occurred. Evidence of the defendant's reckless driving 12 1/2 miles from accident scene was irrelevant. Hart v. State, 75 Wis. 2d 371, 249 N.W.2d 810 (1977).

Evidence of crop production in other years was admissible to prove damages for injury to a crop. Cutler Cranberry Co. v. Oakdale Electric Cooperative, 78 Wis. 2d 222, 254 N.W.2d 234 (1977).

A complaining witness's failure to appear to testify on 2 prior trial dates was not relevant to the credibility of the witness. Rogers v. State, 93 Wis. 2d 682, 287 N.W.2d 774 (1980).

Testimony that weapons were found at the accused's home was admissible as part of a chain of facts relevant to the accused's intent to deliver heroin. State v. Wedgeworth, 100 Wis. 2d 514, 302 N.W.2d 810 (1981).

Evidence of a defendant's prior sexual misconduct was irrelevant when the only issue in a rape case was whether the victim consented. State v. Alsteen, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

Evidence of post-manufacture industry custom was admissible under the facts of a products liability case. Evidence of a good safety record of the product was not relevant. D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

HLA and red blood cell test results showing the probability of exclusion and the paternity index are generally admissible in a criminal sexual assault action in which the assault allegedly resulted in the birth of a child, but the probability of paternity is not generally admissible. State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988).

Third-party testimony corroborating the victim's testimony against one defendant was relevant as to a 2nd defendant charged with different acts when the testimony tended to lend credibility to the victim's testimony against the 2nd defendant. State v. Patricia A.M. 176 Wis. 2d 542, 500 N.W.2d 289 (1993).

Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant. State v. Tabor, 191 Wis. 2d 483, 529 N.W.2d 915 (Ct. App. 1995).

Evidence of why a defendant did not testify has no bearing on guilt or innocence, is not relevant, and is inadmissible. State v. Heuer, 212 Wis. 2d 58, 567 N.W.2d 638 (Ct. App. 1997).

A psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child was relevant. State v. Richard A.P. 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

A negative gunshot residue test cannot conclusively prove that a person was not the shooter of a gun, but it is relevant as it has a tendency to make it less probable. State v. De Real, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App.1999).

904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

History: Sup. Ct. Order, 59 Wis. 2d R1, R70 (1973).

A defendant does not have a constitutional right to present irrelevant evidence. State v. Robinson, 146 Wis. 2d 315, 431 N.W.2d 165 (1988).

904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History: Sup. Ct. Order, 59 Wis. 2d R1, R73 (1973).

Under this section, it was within the discretion of the trial court to admit the victim's bloodstained nightgown and to allow it to be sent to the jury room when:

(a) the nightgown clearly was of probative value, since available photographs failed to show the underside of the garment;

(b) the article was not of a nature that would shock the sensibilities of the jury and inflame it to the prejudice of defendant; and

(c) no objection was made to sending the item to the jury room. Jones v. State, 70 Wis. 2d 41, 233 N.W.2d 430 (1975).

Evidence of alcoholic degenerative impairment of the plaintiff's judgment had limited probative value, far outweighed by possible prejudice. Walsh v. Wild Masonry Co., Inc. 72 Wis. 2d 447, 241 N.W.2d 416 (1976).

The trial court did not abuse its discretion in refusing to admit exhibits offered at the 11th hour to establish a defense by proof of facts not previously referred to. Roeske v. Diefenbach, 75 Wis. 2d 253, 249 N.W.2d 555 (1977).

When evidence was introduced for the purpose of identification, the probative value of conduct during a prior rape case exceeded the prejudicial effect. Sanford v. State, 76 Wis. 2d 72, 250 N.W.2d 348 (1977).

When the defendant was charged with attempted murder of police officers in pursuit of the defendant following an armed robbery, the probative value of evidence concerning the armed robbery and showing motive for the murder attempt was not substantially outweighed by the danger of unfair prejudice. Holmes v. State, 76 Wis. 2d 259, 251 N.W.2d 56 (1977).

If evidence of other conduct is not offered for a valid purpose under s. 904.04 (2), the balancing test under s. 904.03 is inapplicable. State v. Spraggin, 77 Wis. 2d 89, 252 N.W.2d 94 (1977).

Although a continuance is a more appropriate remedy for surprise, if an unduly long continuance would be required, exclusion of surprising evidence may be justified under this section. State v. O'Connor, 77 Wis. 2d 261, 252 N.W.2d 671 (1977).

In a prosecution for possession of amphetamines, it was an abuse of discretion to admit and send to the jury room a syringe and hypodermic needles that had only slight relevance to the charge. Schmidt v. State, 77 Wis. 2d 370, 253 N.W.2d 204 (1977).

The right of confrontation is limited by s. 904.03 if the probative value of the desired cross-examination is outweighed by the possibility of unfair or undue prejudice. Chapin v. State, 78 Wis. 2d 346, 254 N.W.2d 286 (1977).

Evidence that resulted in surprise was properly excluded under this section. Lease America Corp. v. Insurance Company of North America, 88 Wis. 2d 395, 276 N.W.2d 767 (1979).

The trial court abused its discretion by excluding an official blood alcohol chart offered in evidence by an accused driver. State v. Hintz, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984).

When evidence of a sexual assault was the only evidence of an element of a charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

A defendant's intoxication, for purposes of motor vehicle statutes, did not *per se* demonstrate that the defendant's statements were untrustworthy. State v. Beaver, 181 Wis. 2d 959, 512 N.W.2d 254 (Ct. App. 1994).

The right to confrontation is not violated when the court precludes a defendant from presenting evidence that is irrelevant or immaterial. State v. McCall, 202 Wis. 2d 29, 549 N.W.2d 418 (1996).

904.04 Character evidence not admissible to prove conduct; exceptions; other crimes. (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) ***Character of accused.*** Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) ***Character of victim.*** Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) ***Character of witness.*** Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

History: Sup. Ct. Order, 59 Wis. 2d R1, R75 (1973); 1975 c. 184; 1991 a. 32.

A defendant claiming self defense can testify as to specific past instances of violence by the victim to show a reasonable apprehension of danger. McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

Evidence of delinquency in making withholding tax payments by 3 other corporations of which the accused had been president was admissible to show willfulness of the accused in failing to make such payments as president of a 4th corporation. State v. Johnson, 74 Wis. 2d 26, 245 N.W.2d 687 (1976).

If a prosecution witness is charged with crimes, the defendant can offer evidence of those crimes and otherwise explore on cross–examination the subjective motives for the witness's testimony. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976).

When a defendant claims accident in shooting the deceased, the prosecution may present evidence of prior violent acts to prove intent and absence of accident. King v. State, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

The trial court did not err in refusing to grant a mistrial when police reports concerning an unrelated pending charge against the defendant and the defendant's mental history were accidentally sent to the jury room. Johnson v. State, 75 Wis. 2d 344, 249 N.W.2d 593 (1977).

Evidence of the defendant's prior sales of other drugs was admitted under s. 904.04 (2) as probative of the intent to deliver cocaine. Peasley v. State, 83 Wis. 2d 224, 265 N.W.2d 506 (1978).

Evidence of the defendant's prior fighting was admissible to refute the defendant's claim of misidentification and to impeach a defense witness. State v. Stawicki, 93 Wis. 2d 63, 286 N.W.2d 612 (Ct. App. 1979).

The defendant's 2 prior convictions for burglary were admissible to prove intent to use gloves, a long pocket knife, a crowbar, and a pillowcase as burglarious tools. Vanlue v. State, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

Criminal acts of the defendant's co–conspirators were admissible to prove plan and motive. Haskins v. State, 97 Wis. 2d 408, 294 N.W.2d 25 (1980).

Evidence of other crimes was admissible to show plan and identity. State v. Thomas, 98 Wis. 2d 166, 295 N.W.2d 784 (Ct. App. 1980).

Evidence of a similar killing committed 12 hours after the shooting in issue was relevant to show that both slayings sprang from like mental conditions, and to show plan or scheme. Barrera v. State, 99 Wis. 2d 269, 298 N.W.2d 820 (1980).

Evidence of the defendant's prior sexual misconduct was irrelevant when the only issue in a rape case was whether the victim consented. State v. Alsteen, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

Other crimes evidence was admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. State v. Pharr, 115 Wis. 2d 334, 340 N.W.2d 498 (1983).

Other crimes evidence was admissible to rebut the defendant's claim that his presence in the backyard of a burglarized home was coincidental and innocent. State v. Rutchik, 116 Wis. 2d 61, 341 N.W.2d 639 (1984).

When the accused claimed that a shooting was in self–defense, the court abused its discretion by excluding opinion evidence as to the victim's reputation for violence. State v. Boykins, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984).

Under the "greater latitude of proof" principle applicable to other acts evidence in sex crimes, particularly those with children, sex acts committed against the complainant and another young girl 4 and 6 years prior to the charged assault were admissible under sub. (2) to show plan or motive. State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763 (1987).

The admission under sub. (2) of a prowling ordinance violation by the defendant accused of second–degree sexual assault and robbery was harmless error. State v. Grant, 139 Wis. 2d 45, 406 N.W.2d 744 (1987).

Evidence of the defendant's use of an alias was relevant to show the defendant's intent to cover up participation in a sexual assault. State v. Bergeron, 162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991).

When evidence of a sexual assault was the only evidence of an element of the charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction for the charged offense. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

In addition to the sub. (2) exceptions, a valid basis for the admission of other crimes evidence is to furnish the context of the crime if necessary to the full presentation of the case. State v. Chambers, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992).

There is no presumption of admissibility or exclusion for other crimes evidence. State v. Speer, 176 Wis. 2d 1101,501 N.W.2d 429 (1993).

Evidence of other crimes may be offered in regard to the *question* of *intent* despite the defendant's assertion that the charged act never occurred. State v. Clark, 179 Wis. 2d 484, 507 N.W.2d 172 (Ct. App. 1993).

Other acts evidence is relevant if a jury could find by a preponderance of the evidence that the defendant committed the other act. An acquittal does not prevent offering evidence of a prior crime for purposes authorized under this section. State v. Lindner, 191 Wis. 2d 107, 528 N.W.2d 36 (Ct. App. 1995).

Other acts evidence in a child sexual assault case was admissible when the type of contact was different and the victim were of a different gender, because the prior act was probative of the defendant's desire for sexual gratification from children. State v. Tabor, 191 Wis. 2d483.529 N.W.2d 915 (Ct. App. 1995).

To be admissible for purposes of identity, "other–acts evidence" must have a similarity to the present offense so that it can be said that the acts constitute the imprint of the defendant State v. Rushing, 197 Wis. 2d 631, 541 N.W.2d 155 (Ct. App. 1995).

Verbal statements may be admissible as other acts evidence even when not acted upon. State v. Jeske, 197 Wis. 2d 906,541 N.W.2d 225 (Ct. App. 1995).

There is not a *per se* rule that enables the state to always submit other acts evidence on motive and intent. The evidence is subject to general strictures against use when the defendant's concession on the element for which it is offered provides a more direct source of proof. State v. Wallerman, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996).

Evidence of a defendant's probation or parole status and the conditions thereof are admissible if the evidence demonstrates motive for or otherwise explains the defendant's criminal conduct. The status itself must provide the motive for the action. An action in direct violation of a condition may not be admitted to demonstrate an irresistible impulse to commit the particular crime. State v. Kourtidias, 206 Wis. 2d 573,557 N.W.2d 858 (Ct App. 1996).

A 3–step analysis is applied to determine the admissibility of other acts evidence. The proponent of the evidence bears the burden of persuading the court that the 3–step inquiry is satisfied. The proponent and opponent of the evidence must clearly articulate their reasons for seeking admission or exclusion and apply the facts to the analytical framework. State v. Sullivan. 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Other acts evidence may be admitted for purposes other than those enumerated in sub. (2). Evidence of a history of assaultive behavior was property admitted in relation to entitlement to punitive damages that rested on proof of either the defendant's intentional disregard of the plaintiff's rights or maliciousness. Smith v. Golde, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1998).

When a defendant seeks to introduce other acts evidence of a crime committed by an unknown 3rd–person, courts should engage in the *Sullivan* 3–step analysis. State v. Scheidell, 227 Wis. 2d 285, 595 N.W.2d 661 (1999).

The exception to the general rule barring other acts evidence is expanded in sexual assault cases, particularly those involving children. However the evidence must still meet the requirements of the 3–step analytical framework articulated in *Sullivan*. State v. Davidson, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

A "plan" in sub. (2) means a design or scheme to accomplish some particular purpose. Evidence showing a plan establishes a definite prior design that includes the doing of the acts charged. Similarity of facts is not enough to admit other acts evidence. State v. Cofield, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214.

Evidence of criminal acts by an accused that were intended to obstruct or avoid punishment was not evidence of "other acts" admissible under sub. (2), but was admissible to prove consciousness of guilt of the principal criminal charge. State v. Bauer, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902.

For other acts evidence to be admissible it must relevant, that is it must relate to a fact or proposition that is of consequence and have probative value. The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. In a sexual assault case, the age of the victim is an important condition in determining similarity. State v. Meehan, 2001 WI App 119, 244 Wis. 2d 121. 630 N.W.2d 722.

When other acts evidence was erroneously allowed. additional testimony about that act was not harmless error. State v. Meehan, 2001 WI App 119.244 Wis. 2d 121.630 N.W.2d 722.

A trial court ruling that other acts evidence is admissible does not force a defendant to enter into a *Wallerman* stipulation. By entering into a *Wallerman* stipulation to prevent the admission of the other acts evidence a defendant waives the right to appeal the other acts ruling. Generally there can be no prejudicial error from a ruling that evidence is admissible if the evidence is not actually admitted. Stale v. Frank, 2002 WI App 31, 250 Wis. 2d 95, 640 N.W.2d 198.

A defendant may, subject to the court's discretion, introduce expert testimony to show that he or she lacks the character traits of a sexual offender and is unlikely to have committed the assault in question. If the expert will testify, either explicitly or implicitly, on facts surrounding the crime charged, the court may compel the defendant to undergo a compulsory examination conducted by an expert selected by the state. State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913.

The state and the court are not required to agree to *Wallerman* stipulations.

A *Wallerman* stipulation in a child sexual assault case is directly contrary to the greater latitude rule for the admission of other acts evidence in child sexual assault cases. The state must prove all elements of a crime. even elements the defendant does not dispute. Accordingly, evidence relevant to undisputed elements is admissible. State v. Veach, 2002 WI 110, ___ Wis. 2d ___, 645 N.W.2d 913.

Sub. (2) will not be interpreted to admit all past conduct involving an element of the present crime. State v. Barreau, 2002 WI App 198, ___Wis. 2d. ___, *651* N.W.2d 12.

Pictures depicting violence were offered to prove the defendant's fascination with *death* and mutilation, *and* that trait is undeniably *probative* of *motive*, intent, or plan to commit a vicious murder. Dressler v. McCaughtery, 238 F.3d 908 (2001).

904.05 Methods of proving character. **(1) REPUTATION OR OPINION.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On* cross–examination, inquiry is allowable into relevant specific instances of conduct.

(2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

History: Sup. Ct. Order, 59 Wis. 2d R1, R80 (1973); 1991 a. 32.

A detective's opinion of a drug addict's reputation for truth and veracity did not qualify to prove reputation in the community because it was based on 12 varying opinions of persons who knew the addict, from which a community reputation could not be ascertained. Edwards v. State, 49 Wis. 2d 105,181 N.W.2d 383 (1970).

When a defendant's character evidence is by expert opinion and the prosecution's attack on the basin of the opinion is answered evasively or equivocally, then the trial court may allow the prosecution to present evidence of specific incidents of conduct. King v. State, 75 Wis. 2d 26,248 N.W.2d 458 (1977).

Self–defense—prior acts of the victim. 1974 WLR 266.

904.06 Habit; routine practice. **(1) ADMISSIBILITY.** Except as provided in s. 972.11 (2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the hahit or routine practice.

(2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

History: Sup. Ct. Order, 59 Wis. 2d R1, R83 (1973); 1975 c. 184.

Although a specific instance of conduct occurs only once, the evidence may be admissible under sub. (2). French v. Sorano, 74 Wis. 2d 460, 247 N.W.2d 182 (1976).

Use of specific instances evidence is discussed. State v. Evans, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994).

Habit evidence must be distinguished from character evidence. Character is a generalized description of a person's disposition or of the disposition in respect to a general trait. Habit is more specific denoting one's regular response to a repeated situation. However, habit need not be "semi–automatic" or "virtually unconscious." Steinberg v. Arcilla, 194 Wis. 2d 759, 535 N.W.2d 444 (Ct. App. 1995).

CHAPTER 906

EVIDENCE — WITNESSES

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed With chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the ruler for information purposes.

906.01 General rule of competency. Eveiy person is competent to be a witness except as provided hy ss. 885.16 and 885.17 or as otherwise provided in these mles.

History: Sup. Ct. Order, 59 Wis. 2d R1, R157 (1973).

The "best evidence rule" requires production of a writing lo prove its contents. There is no comparable "better evidence rule" that requires the production of an item rather than testimony about the item. York v. State, 45 Wis. 2d 550, 173 N.W.2d 693 (1970).

The trial court may not declare a witness incompetent to testify, except as provided in this section. A witness's credibility is determined by the fact finder. State v. Hanson, 149 Wis. 2d474.439 N.W.2d 133 (Ct. App. 1989).

906.02 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

History: Sup. Ct. Order, 59 Wis. 2d R1, R169 (1973); 1991 a.32.

The chain of custody to items taken from the defendant's motel room was properly established although a police department laboratory chemist who examined the rune was not present to testify when uncontroverted proof showed that the condition of the exhibits had not been altered by the chemist's examination, there was no unexplained or missing link as to who had had custody, and the items were in substantially the same condition at the time of the chemist's examination as when taken from defendant's room. State v. McCarty, 47 Wis. 2d 781, 177 N.W.2d 819 (1970).

A challenge to the admissibility of boots on the ground that the victim did not properly identify them was devoid of merit. as it was stipulated that the child said they "could he" the ones she saw. Her lack of certitude did not preclude admissibility, but went to the weight the jury should give to her testimony. Howland v. State, 51 Wis. 2d 162, 186 N.W.2d 319 (1971).

906.03 Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, hy oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so

(2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall he the truth, the whole truth and nothing hut the truth, so help you God.

(3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing hut the truth: and this you do under the pains and penalties of perjury

(4) The assent to the oath or affirmation by the person making it may be manifested hy the uplifted hand.

History: Sup. Ct. Order, 59 Wis. 2d R1, R161 (1973); 1991 a.32.

A witness rho is a young child need not be formally sworn to meet the oath or affirmation requirement. State v. Hanson, 149 Wis. 2d 474, 439 N.W.2d 133 (1989).

906.04 Interpreters. An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

History: Sup. Ct. Order, 59 Wis. 2d R1, R162 (1973); 1981 c. 390; 1991 a. 32.

906.05 Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

History: Sup. Ct. Order, 59 Wis. 2d R1, R163 (1973).

A judge who carefully considered the transcribed record and her recollection of a previous proceeding involving the defendant, did not impermissibly testify. State v. Meeks, 2002 WI App 65, 251 Wis. 2d 361, 643 N.W.2d 526.

906.06 Competency of juror as witness. (1) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial infonnation was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or cvidcncc of any statement by the juror concerning a matter ahout which the juror would be precluded from testifying be received.

History: Sup. Ct. Order, 59 Wis. 2d R1, R165 (1973); 1991 a.32.

Verdict impeachment requires evidence that is: 1) competent; 2) shows substantive grounds sufficient to overturn the verdict; and 3) shows resulting prejudice. Impeachment of a verdict through juror affidavits or testimony is discussed. Arthur H... Wahling v. Lanceil Management Co. 108 Wis. 2d 734, 324 N.W.2d 686 (1982).

There was probable prejudice when the question of a depraved mind was central and a juror went to the jury room with a dictionary definition of "depraved" written on a card. State v. Orr, 111 Wis. 2d 691, 331 N.W.2d 629 (Ct. App. 1983).

A conviction was reversed where extraneous information improperly brought to the jury's attention raised a reasonable possibility that error had prejudicial effect on the hypothetical average jury. State v. Poh, 116 Wis. 2d 510, 343 N.W.2d 108 (1984).

Evidence of a juror's racially-prejudiced remark during jury deliberations was not competent under sub. (2). State v. Shillcutt, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

In any jury trial, material prejudice an the pan of any juror impairs the right to a jury trial. That prejudicial material was brought to only one juror's attention and was not communicated to any other jurors is irrelevant to determining whether that information was "improperly brought to the jury's attention" under sub. (2). Castenada v. Pederson, 185 Wis. 2d 200, 518 N.W.2d 246 (1994), State v. Messelt, 185 Wis. 2d 255, 518 N.W.2d 232 (1994).

Extraneous information is information, other than the general wisdom that a juror is expected to possess, that a juror obtains from a non-evidentiary source. A jumr who consciously brings non-evidentiary objects to show the other jurors improperly brings extraneous information before the jury. State v. Eison, 188 Wis. 2d 298, 525 N.W.2d 91 (Ct. App. 1904)

Sub. (2) does not limit the testimony of a juror regarding clerical errors in a verdict. A written verdict not reflecting the jury's oral decision may be impeached by showing in a timely manner and beyond a reasonable doubt that all jurors are in agreement that an error was made. State v. Williquette, 190 Wis. 2d 678, 526 N.W.2d 144 (Ct. App. 1995).

An analytical framework to be used to determine whether a new trial on the grounds of prejudice due to extraneous juror information is outlined. State v. Eison, 194 Wis. 2d 160, 533 N.W.2d 738 (1995).

Jurors may rely on their common sense and life experience during deliberations, including expertise that a juror may have on a particular subject. That a juror was a pharmacist did not make his knowledge about the particular effect of a drug extrane-

ous information subject to inquiry under sub. (2). State v. Heifkemper, 196 Wis. 2d 218, 538 N.W.2d 561 (Ct. App. 1995).

The extraneous information exception under sub. (2) is not limited to factual information but also includes legal information obtained outside the proceeding. State v. Wulff, 200 Wis. 2d 318, 546 N.W.2d 522 (Ct. App. 1996).

Generally, the sole area jurors are competent to testify to is whether extraneous information was considered. Except when juror bias goes to a fundamental issue such as religion, evidence of juror perceptions is not competent, no matter how mistaken, and cannot form the basis for granting a new trial. Anderson v. Burnett County, 207 Wis. 2d 585, 558 N.W.2d 636 (Ct. App. 1996).

The trial court, and not the defendant or the defendant's attorney, is permitted to question a juror directly at a hearing regarding juror bias. The trial court's **discretion** in submitting **questions suggested** by the defendant is limited, but the failure to submit questions is subject to **harmless** error evaluation. State v. Delgado, 215 Wis. 211 16, **572** N.W.2d **479** (Ct. **App.** 1997).

It was reasonable to refuse to allow a former member of the jury from testifying as a witness in the same case. Broadhead v. **State** Farm Mutual Insurance Co. 217 Wis. 2d 231, 579 N.W.2d 761 (Ct. App. **1998).**

For a juror to he competent to testify regarding extraneous information brought to the jury within the sub. **(2) exception,** the information must he potentially prejudicial, which it may he **if** it conceivably relates to a central issue of the trial. After determining whether testimony is competent **under** sub. (2), the court must find **clear,** satisfactory, and convincing evidence that the juror heard or made the comments alleged, and if it does, must then decide whether prejudicial error requiring reversal exists. State v. Broomfield, 223 Wis. 2d 465, 589 N.W.2d 225 (1999).

There is no bright line rule regarding the time lag between the return of a verdict and when evidence of a clerical error in a verdict must be obtained or be rendered insufficiently trustworthy. Grice Engineering, Inc. v. Szyjewski, **2002** WI **App** *104,* 254 Wis. 2d **743. 648** N.W.2d **487.**

Proof beyond a reasonable doubt to impeach a civil jury trial may be supplied by showing that five–sixths of the jurors agree that the reported verdict is in error and agree on the corrected verdict, provided each of these jurors was a part of the original group in favor of the verdict. This approach meets the "all of the jurors" requirement in *Wilguette.* Grice Engineering, Inc. v. Szyjewski, 2002 WI App 104, 254 Wis. 2d 743, 648 N.W.2d 487.

906.07 Who may impeach. The credibility of a witness may be attacked by any party, including the party calling the witness.

History: Sup. Ct. Order, 59 Wis. 2d R1, R169 (1973); 1991 a. 32.

906.08 Evidence of character and conduct of witness.

(1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross–examination of the witness or on cross–examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self–incrimination when examined with respect to matters which relate only to credibility.

History: Sup. Ct. Order, 59 Wis. 2d R1, R171 (1973); 1975 c. 184, 421; 1991 a. 32; 1995 a. 77, 225.

The trial court committed plain error by admitting extrinsic impeaching testimony on a collateral issue. McClelland v. State, 84 Wis. 2d 145, 267 N.W.2d 843 (1978).

When credibility of a witness was a critical issue, exclusion of evidence offered **under** sub. (1) was grounds for discretionary reversal. State v. Cuyler, 110 Wis. 2d 133, 327 N.W.2d 662 (1983).

Impeachment of an accused by extrinsic evidence on a collateral matter was harmless error. State v. Sonnenberg, 117 Wis. 2d **159,344** N.W.2d **95** (1984).

Absent an attack on **credibility,** a complainant's **testimony** that she **had** not **initiated** a civil action for damages was inadmissible when **used** to holster credibility. Stale v. Johnson, **149** Wis. **2d 418,439** N.W.2d 122 (1989), confirmed, 153 Wis. 2d 121, 449 N.W.2d **R45** (1990).

Allegations of professional misconduct against the prosecution's psychiatric expert initially referred to *the* prosecutor's office but immediately transferred to **a** special prosecutor for **investigation** and **possible** criminal proceedings were properly excluded as a subject of cross examination of the expert **due** to **a lack** of logical **connection** between the expert and the prosecutor necessary **to** suggest bias. State v. Lindh, 161 Wis. 2d 324, 468 N.W.2d 168 (1991).

Whether a witness's credibility **has** been sufficiently **attacked** to constitute an attack on ***the*** witness's character for truthfulness permitting rehabilitating character testimony **is a** discretionary **decision.** State v. **Anderson,** 163 Wis. 2d **342. 471** N.W.2d 279 (Ct. **App** 1991).

No witness, expert or otherwise, should be permitted to **give** an opinion that another **menially and** physically competent **witness is** telling ***the*** truth. It was improper for **a prosecutor** to repeatedly inquire of ***a*** defendant whether other witnesses were mistaken in their testimony. State v. Kuehl, 199 Wis. **2d** 143, **545** N.W.2d **840** (Ct. App. **1995).**

Evidence that an expert in a medical malpractice action was named as a defendant in a separate malpractice action was inadmissible for impeachment purposes under this section because it did not cast light on the expert's character for truthfulness. Nowatzke v. Osterloh, 201 Wis. 2d 497, 549 N.W.2d 256 (Ct. App. 1996).

Character evidence may be allowed under sub. (1) (b) based on attacks on the witness's character made in opening statements. Allegations of a single instance of falsehood cannot imply a character for untruthfulness. The attack on the witness must be an assertion that the witness is a liar generally. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

It was appropriate for an expert to testify to the nature of witnesses' cognitive disabilities and how those mental impairments affected the witnesses' ability to testify or recall particular facts, but the expert's testimony that the witnesses were incapable of lying violated the rule that a witness is not permitted to express an opinion on whether another physically and mentally competent witness is telling the truth. State v. Tutlewski, 231 Wis. 2d 379, 605 N.W.2d 561 (1999).

Evidence that a witness belongs to an organization, such as a street gang, is admissible to impeach the witness's testimony by showing bias. State v. Long, 2002 WI App 114, 254 Wis. 2d 654, 647 N.W.2d 884.

906.09 Impeachment by evidence of conviction of crime or **adjudication of delinquency. (1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross–examining the witness is not concluded by the witness's answer.

(2) EXCLUSION. Evidence of a conviction of **a** crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger **of** unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION OR ADIUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall he permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL. The pendency *of* an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

History: Sup. Ct. Order, 59 Wis. 2d R1, R176 (1973); 1991 a.32; 1995a.77.

This section **applies** to both civil and **criminal** actions. If a plaintiff is **asked** by **his** own attorney whether be has ever been convicted of a crime, he can he **asked** on cross–examination as to the number of times. Underwood v. Strasser, **48** Wis. 2d ***568.*** 180 N.W.2d **631** (1970).

It was not **error** to **give** an instruction as to **prior convictions** affect on credibility when the **prior case** was **a** misdemeanor, McKissick v. **Slate, 49** Wis. 2d **537.** 182 N.W.2d 282 (1971).

When a defendant's answers **on direct examination** with **respect** to the **number of** his prior convictions were inaccurate or incomplete, the correct and complete facts could be brought out on cross–examination, during which it is permissible to mention the crime by name in order to insure that the witness understands the particular conviction being referred to. Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1971).

Proffered evidence that a witness had been convicted of drinking offenses 18 times in the last 19 years could be rejected as immaterial if the evidence did not affect his credibility. Barren v. State, 55 Wis. 2d 460, 198 N.W.2d 345 (1972).

When the defendant in a rape case denied the incident in an earlier rape case tried in juvenile court, impeachment evidence of a police officer that the defendant had admitted the incident at the time was not barred by sub. (4). Sanford v. State, 76 Wis. 2d 72, 250 N.W.2d 348 (1977).

When a witness truthfully acknowledges a price conviction, inquiry into the nature of the conviction may not be made. Voith v. Buser, 83 Wis. 2d 540, 266 N.W.2d 304 (1978).

A defendant's 2 prior convictions for burglary were admissible to prove intent to use **gloves, a** long pocket knife, a crowbar, and **a** pillow case **as** burglarious tools. Vanlue v. **Swie,** *96* Wis. **2d 81,** 291 N.W.2d **467** (1980).

Cross–examination **on prior** convictions without the trial **court's** threshold determination under sub. (3) was prejudicial. Gyrion v. Bauer, 13%Wis. **2d 434,** 393 N.W.2d 107 (Ct. App. 1986).

An accepted guilty plea constitutes **a** "conviction" for purposes of impeachment under sub. (1). State v. Trudeau, 157 Wis. 2d 51, 458 N.W.2d 383 (Ct. App. 1990).

An expunged conviction is not admissible to attack witness credibility. **State** v. Anderson, 160 Wis. 2d 435, 466 N.W.2d 681 (Ct. **App.** 1991).

Whether to admit evidence of prior convictions for impeachment purposes requires consideration of: 1) the lapse of time since the **conviction:** 2) the rehabilitation of the person convicted; 3) the *gravity of the* **crime;** *and 4) the involvement of* dishonesty in the **crime.** If allowed, the existence **and** number of convictions **may he** admitted, but the nature of the **convictions** may not he discussed. State v. Smith, 203 Wis. **2d** 288. 553 N.W.2d 824 (Ct. App. 1996).

Evidence that exposed a witness's prior life sentences and that he could suffer no penal consequences from confessing to the crime in question was properly admitted. State v. Scott, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753.

906.10 Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

History: Sup. Ct. Order, 59 Wis. 2d R1, R184 (1973); 1991 a. 32.

906.11 Mode and order of interrogation and presentation. (1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

(a) Make the interrogation and presentation effective for the ascertainment of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment.

(2) SCOPE OF CROSS-EXAMINATION. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(3) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

History: Sup. Ct. Order, 59 Wis. 2d R1, R185 (1973); 1991 a. 32; 1999 a. 85.

A question is not leading if it merely suggests a subject rather than a specific answer that may not be true. Hicks v. State, 47 Wis. 2d 38, 176 N.W.2d 386 (1970).

It is error for a trial court to restrict cross-examination of an accomplice who was granted immunity, but the conviction will not be reversed if the error was harmless. State v. Schenk, 53 Wis. 2d 327, 193 N.W.2d 26 (1972).

A defendant who testifies in his own behalf may be recalled for further cross-examination to lay a foundation for impeachment. Evidence that on a prior occasion the defendant did not wear glasses and that he had a gun similar to that described by the complainant was admissible when it contradicted the defendant's earlier testimony. Parham v. State, 53 Wis. 2d 458, 192 N.W.2d 838 (1972).

A trial judge should not strike the entire testimony of a defense witness for refusal to answer questions bearing on his credibility which had little to do with guilt or innocence of defendant. State v. Monsoor, 56 Wis. 2d 689, 203 N.W.2d 20 (1973).

A trial judge's admonitions to an expert witness did not give the appearance of judicial partisanship requiring a new trial. Peoples v. Sargent, 77 Wis. 2d 612, 253 N.W.2d 459 (1977).

The extent of, manner, and right of multiple cross-examinations by different counsel representing the same party can be controlled by the trial court. Hochgurtel v. San Felippo, 78 Wis. 2d 70, 253 N.W.2d 526 (1977).

A defendant has no right to be actively represented in court both by himself or herself and by counsel. Moore v. State, 83 Wis. 2d 285, 265 N.W.2d 540 (1978).

Leading questions were properly used to refresh a witness's memory. Jordan v. State, 93 Wis. 2d 449, 287 N.W.2d 509 (1980).

By testifying to his actions on the day a murder was committed, the defendant waived the self-incrimination privilege on cross-examination as to previous actions reasonably related to the direct examination. Neely v. State, 97 Wis. 2d 38, 292 N.W.2d 859 (1980).

The use of leading questions in direct examination of a child is discussed. State v. Barnes, 203 Wis. 2d 132, 552 N.W.2d 857 (Ct. App. 1996).

A chart prepared by the prosecutor during a trial, in the jury's presence, to categorize testimony was not a summary under s. Y10.06 but was a "pedagogical device" admissible within the court's discretion under this section. State v. Olson, 217 Wis. 2d 730,579 N.W.2d 802 (Ct. App. 1998).

The rule of completeness for oral statements is encompassed within this section. A party's use of an out-of-court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

There was no misuse of discretion in allowing a 3-year old child witness to sit on her grandmother's lap while testifying regarding an alleged sexual assault. The trial court has the power to alter courtroom procedures in order to protect the emotional well-being of a child witness and is not required to determine that a child is unable to testify unless accommodations are provided. State v. Shanks, 2002 WI App 93, 254 Wis. 2d 600,644 N.W.2d 275.

While sub. (1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered and must give way when the exercise of discretion runs afoul of other statutory provisions that are not discretionary. State v. Smith, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15.

906.12 Writing used to refresh memory. If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it. to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera. excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

History: Sup. Ct. Order, 59 Wis. 2d R1, R193 (1973); 1991 a.32.

906.13* Prior statements of witnesses.** ***(1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the cxamination.

(2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a **prior** inconsistent statement by a witness is not admissible unless any of the following is applicable:

1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.

2. The witness has not been excused from giving further testimony in the action.

3. The interests of justice otherwise require.

(b) Paragraph (a) does not apply to admissions **of** a party-opponcnt **as** defined in s. 908.01 (4) (b).

History: Sup. Ct. Order, 59 Wis. 2d R1, R197 (1973); 1991 a. 32; 1999 a. 85.

A witness for the defense could be impeached by prior inconsistent statements to the district attorney even though made in the course of plea bargaining as to a related offense. Taylor v. State, 52 Wis. 2d 453, 190 N.W.2d 208 (1971).

A statement by a defendant, not admissible as part of the prosecution's case because it was taken without the presence of the defendant's counsel, may be used on cross-examination for impeachment if the statement is trustworthy. Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

A bright line test for determining whether a defendant's prior inconsistent statement is admissible for impeachment is whether it was compelled. State v. Pickett, 150 Wis. 2d 720, 442 N.W.2d 509 (Ct. App. 1989).

This section is applicable in criminal cases. A defense investigator's reports of witness interviews are statements under Sub. (1) but only must be disclosed if defense counsel has examined the witness concerning the statements made to the investigator. State v. Hereford, 195 Wis. 2d 1054,537 N.W.2d 62 (Ct. App. 1995).

A prior inconsistent statement is admissible under sub. (2) without first confronting the witness with that statement. Under sub. (2) (a) 2. and 3. extrinsic evidence of prior inconsistent statements is admissible if the witness has not been excused from giving further testimony in the case, or if the interest of justice otherwise requires its admission. State v. Smith, 2002 WI App 118, 254 Wis. 2d 654,648 N.W.2d 15.

906.14 Calling and interrogation of witnesses by judge. (1) CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(2) INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.

(3) OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation hy the judge may be made at the time or at the next available opportunity when the jury is not present.

History: Sup. Ct. Order, 59 Wis. 2d R1, R200 (1973); 1991 a.32.

A trial judge's elicitation of trial testimony is improper if the cumulative effect of the judge's questioning and direction of the course of the trial has a substantial prejudicial effect on the jury. Schultz v. State, 82 Wis. 2d 737,264 N.W.2d 245 (1978).

906.15 Exclusion of witnesses. (1) At the request of a party, the judge or a circuit court commissioner shall order witnesses cxcludcd so that they cannot hear the testimony of other

witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

(a) A party who is a natural person.

(b) An officer or employee of a **party** which is not a natural person designated as its representative by its attorney.

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or circuit court commissioner finds that exclusion of the victim is necessary *to* provide a fair trial for the defendant or a fair fact–finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary *to* provide a fair trial for the defendant or a fair fact–finding hearing for the juvenile.

(3) The judge or circuit court commissioner may direct that all excluded and non–excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

History: Sup. Ct. Order, 59 Wis. 2d R1, R202 (1973); 1991 a. 32; 1997 a. 181; 2001 a. 61.

CHAPTER 907

EVIDENCE — OPINIONS AND EXPERT TESTIMONY

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

History: Sup. Ct. Order, 59 Wis. 2d R1, R205 (1973); 1991 a. 32.

When a victim admitted injecting heroin about 72 hours before testifying, the trial court properly denied the defendants' request that the witness display his arm in the presence of the jury in an attempt to prove that the injection was more recent, correctly ruled that the jury was unqualified to so determine but that discovery might be required outside of the presence of the jury before an expert competent to judge the freshness of the needle marks. Edwards v. State, 49 Wis. 2d 105, 181 N.W.2d 383 (1970).

An attorney, not qualified as an expert, could testify regarding negotiations in which he was an actor, including expressing opinions about the transaction, but could not testify as to what a reasonably competent attorney would or should do in similar circumstances. Hennig v. Ahearn, 230 Wis. 2d 149, 601 N.W.2d 14 (Ct. App. 1999).

907.02 Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

History: Sup. Ct. Order, 59 Wis. 2d R1, R206 (1973).

A chemist testifying as to the alcohol content of blood may not testify as to the physiological effect that the alcohol would have on the defendant. State v. Bailey, 54 Wis. 2d 679, 196 N.W.2d 664 (1972).

The trial court abused its discretion in ordering the defendant to make its expert available for adverse examination because the agreement was for the exchange of expert reports only and did not include adverse examination of the expert retained by the defendant. Brouster Co. v. Waukesha Foundry Co. 65 Wis. 2d 468, 222 N.W.2d 920 (1974).

In a personal injury action, the court did not err in permitting a psychologist specializing in behavioral disorders to refute a physician's medical diagnosis when the specialist was a qualified expert. Qualification of an expert is a matter of experience, not licensure. Karl v. Employers Insurance of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

The standard of nonmedical, administrative, ministerial, or routine care in a hospital need not be established by expert testimony. Any claim against a hospital based on negligent lack of supervision requires expert testimony. Payne v. Milw. Sanitarium Foundation, Inc. 81 Wis. 2d 264, 260 N.W.2d 386.

In the absence of some additional expert testimony to support the loss, a jury may not infer permanent loss of earning capacity from evidence of permanent injury. Koele v. Radue, 81 Wis. 2d 583,260 N.W.2d 766 (1978).

Res ipsa loquitur instructions may be grounded on expert testimony in a medical malpractice case. Kelly v. Hartford Cas. Ins. Co. 86 Wis. 2d 129, 211 N.W.2d 616 (1978).

A hypothetical question may be based on facts not yet in evidence. Novitzke v. State. 92 Wis. 2d 302,284 N.W.2d 904 (1979).

It was not error to allow psychiatric testimony regarding factors that could influence eye witness identification, but to not allow testimony regrading the application of those factors to the facts of the case. Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

A psychiatric witness, whose qualifications as expert were conceded, had no scientific knowledge on which to base an opinion as to the accused's lack of specific intent to kill. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

Medical records as explained to the jury by a medical student were sufficient to support a conviction; the confrontation right was not denied. Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981).

Polygraph evidence is inadmissible in any criminal proceeding. State v. Dean, 103 Wis. 2d 228. 307 N.W.2d 628 (19811.

Guidelines set for admission of testimony of hypnotized witnesses are stated. State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

Expert testimony regarding fingernail comparisons for identification purposes was admissible. State v. Shaw, 124 Wis. 2d 363,369 N.W.2d 772 (Ct. App. 1985).

Bite mark evidence presented by experts in forensic odontology was admissible. State v. Stinson, 134 Wis. 2d 224.397 N.W.2d 136 (Ct. App. 19861.

An expert may give opinion testimony regarding the consistency of the complainant's behavior with that of victims of the same type of crime only if the testimony will assist the fact-finder in understanding evidence or determining a fact, but the expert is prohibited from testifying about the complainant's truthfulness. State v. Jensen, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

Experience, as well as technical and academic training, is the proper basis for giving expert opinion. State v. Hollingsworth, 160 Wis. 2d 883,467 N.W.2d 555 (Ct. App. 1991).

If the state seeks to introduce testimony of experts who have personally examined a sexual assault victim that the victim's behavior is consistent with other victims, a defendant may request an examination of the victim by its own expert. State v. Maday, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993). See also State v. Schaller, 199 Wis. 2d 23,541 N.W.2d 247 (Ct. App. 1995).

Expert opinion regarding victim recantation in domestic abuse cases is permissible. State v. Bednarz, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993).

When the state inferred that a complainant sought psychological treatment as the result of a sexual assault by the defendant, but did not offer the psychological records or opinions of the therapist he evidence, it was not improper for the court to deny the defendant access to the records after determining that the records contained nothing material to the fairness of the trial. State v. Mainiero, 189 Wis. 2d 80,525 N.W.2d 304 (Ct. App. 1994).

An expert may give an opinion about whether a person's behavior and characteristics are consistent with battered woman's syndrome, but may not give an opinion on whether the person had a reasonable belief of being in danger at the time of a particular incident. State v. Richardson, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994).

Expert testimony is necessary to establish the point of impact of an automobile accident. Wester v. Bruggink, 190 Wis. 2d 308, 527 N.W.2d 373 (Ct. App. 1994).

Scientific evidence is admissible, regardless of underlying scientific principles, if it is relevant, the witness is qualified as an expert, and the evidence will assist the trier of fact. State v. Peters, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995).

An indigent may be entitled to have the court compel the attendance of an expert witness. It may be error to deny a request for an expert to testify on the issue of suggestive interview techniques used with a young child witness if there is a "particularized need" for the expert. State v. Kirschbaum, 195 Wis. 2d 11, 535 N.W.2d 462 (Ct. App. 1995).

Items related to drug dealing, including gang–dated items, is a subject of specialized knowledge and a proper topic for testimony by qualified narcotics officers. State v. Brewer, 195 Wis. 2d 295,536 N.W.2d 406 (Ct. App. 1995).

Generally expert evidence of personality dysfunction is irrelevant to the issue of intent in a criminal trial, although it might be admissible in very limited circumstances. State v. Morgan, 195 Wis. 2d 388,536 N.W.2d 425 (Ct. App. 1995).

As with still photographers, a video photographer's testimony that a videotape accurately portrays what the photographer saw is sufficient foundation for admission of the video tape, and expert testimony is not required. State v. Peterson, 222 Wis. 2d 449, 588 N.W.2d 84 (Ct. App. 1998).

If was error to exclude as irrelevant a psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child because the psychologist could not say that the absence of a sexual disorder made it impossible for the defendant to have committed the alleged act. State v. Richard A.P. 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

When the issue is whether expert testimony may be admitted, and not whether it is required, a court should normally receive the expert testimony if the requisite conditions have been met and the testimony will assist the trier of fact. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

A witness's own testimony may limit the witness's qualifications. A witness who disavowed being qualified to testify regarding the safety of a product was disqualified to testify as an expert on the product's safety. Green v. Smith & Nephew APH, Inc. 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727.

If the state is to introduce *Jensen* evidence through a psychological expert who has become familiar with the complainant through ongoing treatment, or through an intensive interview or examination focused on the alleged sexual assault, the defendant must have the opportunity to show a need to meet that evidence through a psychological expert of its own as required by *Maday*. State v. Rizzo, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93.

A determination of whether the state "retains" an expert for purposes of *Maday* cannot stand or fall on whether or how it has compensated its expert. An expert's status as the complainant's treating therapist does not preclude that expert from being "retained" by the state for purposes of *Maday*. State v. Rizzo, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93.

When an expert was permitted to testify in a sexual assault case about common characteristics of sexual assault victims and the consistency of those characteristics with those of the victim at trial, a standing objection to the expert's testifying was insufficient to preserve specific errors resulting from the testimony. State v. Delgado, 2002 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490.

The admissibility of novel scientific evidence: The current state of the Frye test in Wisconsin. Van Domelen. 69 MLR 116 (1985)

Scientific Evidence in Wisconsin: Using Reliability to Regulate Expert Testimony. 74 MLR 261.

State v. Dean: A compulsory process analysis of the inadmissibility of polygraph evidence. 1984 WLR 237.

The psychologist as an expert witness. Gelner. 1973 WBB No. 2.

Scientific Evidence in Wisconsin after Daubert. Blinka. Wis. Law. Nov. 1993.

The Use and Abuse of Expert Witnesses. Brennan. Wis. Law. Oct. 1997.

907.03 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

History: Sup. Ct. Order. 59 Wis. 2d R1, R208 (1973): 1991 a. 32.

The trial court properly admitted the opinion of a qualified electrical engineer although he relied on a pamphlet objected to as inadmissible hearsay. E. D. Wesley Co. v. City of New Berlin, 62 Wis. 2d 668, 215 N.W.2d 657 (1974).

A chiropractor could testify as to a patient's self-serving statements when those statements were used to form his medical opinion under sub. (4). Klingman v. Kruschke, 115 Wis. 2d 124,339 N.W.2d 603 (Ct. App. 1983).

The trial court erred by barring expert testimony on impaired future earning capacity based on government surveys. Brain v. Mann, 129 Wis. 2d 447, 385 N.W.2d 227 (Ct. App. 1986).

While opinion evidence may be based upon hearsay, the underlying hearsay data may not be admitted unless it is otherwise admissible under a hearsay exception. State v. Weber, 174 Wis. 2d 98,496 N.W.2d 762 (Ct. App. 1993).

Although s. 907.03 allows an expert to base an opinion on hearsay, it does not transform the testimony into admissible evidence. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and ahm it must be excluded altogether. State v. Watson, 221 Wis. 2d 167,595 N.W.2d 403 (1999).

This section implicitly recognizes that an expert's "pinion may be based in part on the results of scientific tests or studies that are not his or her own. State v. Williams, 2002 WI 58,253 Wis. 2d 99, 644 N.W.2d 919.

Medical experts may rely on the reports and medical records of others in forming opinions that are within the scope of their own expertise. Enea v. Linn, 2002 WI App 185,___ Wis. 2d ___, 650 N.W.2d 315.

An evaluation of drug testing procedures. Stein, Laessig, Indriksons, 1973 WLR 727.

907.04 Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

History: Sup. Ct. Order, 59 Wis. 2d R1, R211 (1973).

907.05 Disclosure of facts or data underlying expert opinion. The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otheiwise. The expcrt may in any event bc required to disclose the underlying facts or data on cross-examination.

History: Sup. Ct. Order, 59 Wis. 2d R1, R213 (1973); 1991 a. 32.

907.06 Court appointed experts. (1) APPOINTMENT. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the expert witness consents to act. A witness so appointed shall be informed of the witness's duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any: the witness's deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the expert witness as a witness.

(2) COMPENSATION. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under ch. 32. In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by s. 814.04 (2).

(3) DISCLOSURE OF APPOINTMENT. In the exercise of discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) PARTIES' EXPERTS OF O W SELECTIOU. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(5) APPOINTMENT IN CRIMINAL CASES. This section shall not apply to the appointment of experts as provided by s. 971.16.

History: Sup. Ct. Order, 59 Wis. 2d R1, R215 (1973); Sup. Ct. Order, 67 Wis. 2d 784; 1991 a. 32.

As sub. (1) prevents a court from compelling an expert to testify, it logically follows that a litigant should not be able to compel an expert to refuse to testify is implied. Burnett v. Ali, 224 Wis. 2d 72, 589 N.W.2d 21 (1999).

907.07 Reading of report by expert. An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness. Before its use, a copy of the report shall be provided to the opponent.

History: Sup. Ct. Order. 59 Wis. 2d R1, R219 (1973); 1991 a. 32.

CHAPTER 908

EVIDENCE — HEARSAY

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

908.01 Definitions. The following definitions apply under this chapter:

(1) STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) DECLARANT. A "declarant" is a person who makes a statement.

(3) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) ***Prior statement by witness.*** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant's testimony, or

2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. or

3. One of identification of a person made soon after perceiving the person; or

(b) ***Admission by party-opponent.*** The statement is offered against a party and is:

1. The party's own statement, in either the party's individual or a representative capacity, or

2. A statement of which the party has manifested the party's adoption or belief in its truth, or

3. A statement by a person authorized by the party to make a statement concerning the subject, or

4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or

5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

History: Sup. Ct. Order, 59 Wis. 2d R1, R220 (1973); 1991 n.31.

A witness's claimed nonrecollection of a prior statement may constitute inconsistent testimony under sub. (4) (a) 1. State v. Lenarchick, 74 Wis. 2d 425,247 N.W.2d 80 (1975).

Prior consistent statements can be introduced: 1) to rebut an implied or express charge that the testimony was recently fabricated or was the product of improper motive or influence; or 2) if the testimony concerns the identification of a person and a prior statement of identification was made soon after the perception of the the individual. Green v. State, 75 Wis. 2d 631, 210 N.W.2d 305 (1977).

When a defendant implied that the plaintiff recently fabricated a professed belief that a contract did not exist, a financial statement that showed the plaintiff's nonbelief in the existence of the contract was admissible under sub. (4) (a) 2. Gerner v. Vasby, 75 Wis. 2d 660, 250 N.W.2d 319 (1977).

Under sub. (4) (b) 4., there is no requirement that the statement be authorized by the employer or principal. Mercurdo v. County of Milwaukee, 82 Wis. 2d 781. 264 N.W.2d 258 (1978).

Under sub. (4) (b) 1., any prior out-of-court statements by a party, whether or not made "against interest," is not hearsay. State v. Benoit, 83 Wis. 2d 389. 265 N.W.2d 298 (1978).

Sub. (4) (a) 3. applies to statements of identification made soon after perceiving the suspect or his or her likeness in the identification process. State v. Williamson, 84 Wis. 2d 370, 267 N.W.2d 337 (1978).

Statements under sub. (4) (b) 5. are discussed. Bergeron v. State, 85 Wis. 2d 595, 271 N.W.2d 386 (1978).

A robber's representation that a bottle contained nitroglycerine was admissible under sub. (4) (b) 1. to prove that the robber was armed with a dangerous weapon. Beamon v. State, 93 Wis. 2d 215, 286 N.W.2d 592 (1980).

A prior inconsistent statement by a witness at a criminal trial is admissible under sub. (4) (a) 1. as substantive evidence. Vogel v. Slate, 96 Wis. 2d 372,291 N.W.2d 850 (1980).

The admission of a statement by a deceased co-conspirator did not violate the right of confrontation and was within sub. (4) (b) 5. State v. Dorcey, 103 Wis. 2d 152.307 N.W.2d 612 (1981).

Testimony as to a conversation in which the defendant was accused of murder and did not deny it was admissible under the adoptive admissions exception under sub. (4) (b) 2. State v. Marshall, 113 Wis. 2d 643. 335 N.W.2d 612 (1983).

The statement of a coconspirator under sub. (4) (b) 5. may be admitted without proof of the declarant's unavailability or a showing of particular indicia of reliability; the court must determine whether circumstances exist warranting exclusion. State v. Webster, 156 Wis. 2d 510,458 N.W.2d 373 (Ct. App. 1990).

A confession made in Spanish to a detective who took notes and reported in English was admissible under sub. (4) (a). State v. Arroyo, 166 Wis. 2d 74.479 N.W.2d 549 (Ct. App. 1991).

Rule 901.04 (1) permits an out-of-court declaration by a party's alleged coconspirator to be considered by the trial court in determining whether there was a conspiracy under sub. (4) (b) 5. State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992).

When a person relies on a translator for communication, the statements of the translator are regraded as the speaker's for hearsay purposes. State v. Patino, 177 Wis. 2d 348. 502 N.W.2d 601 (Ct. App. 1993).

The admissibility of one inconsistent sentence under rub. (4) (a) 1. does not bring the declarant's entire statement within the scope of that rule. Wikrent v. Toys "R" Us, 179 Wis. 2d 297,507 N.W.2d 130 (Ct. App. 1993).

While polygraph tests are inadmissible, post-polygraph interviews, found distinct both as to time and content from the examination that preceded them and the statements made therein, are admissible. State v. Johnson, 193 Wis. 2d 382, 535 Wir. Zd 441 (Ct. App. 1995).

There must be facts that support a reasonable conclusion that a defendant has "embraced the truth" of someone else's statement as a condition precedent to finding an adoptive admission under sub. (4) (b) 2. State v. Rogers, 199 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995).

Statements made by a prosecutor, not under oath, in a prior proceeding may be considered admissions if: 1) the court is convinced the prior statement is inconsistent with the statement at the later trial; 2) the statements are the equivalent of testimonial statements; and 3) the inconsistency is a fair one and an innocent explanation does not exist. State v. Cardenas-Hernandez, 214 Wis. 2d 71, 571 N.W.2d 406 (Ct. App. 1997).

A party's use of an out-of-court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

To use a prior consistent statement under sub. (4) (a) 2., the proponent must show that the statement predated the alleged recent fabrication and that there was an express or implied charge of fabrication at trial. Arsine v. Cascade Mountain, Inc. 223 Wis. 2d 39, 588 N.W.2d 321 (Ct. App. 1998).

Although s. 907.03 allows an expert to base an opinion on hearsay, it does not transform the testimony into admissible evidence. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and when it must be excluded altogether. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

When a criminal defendant objects to testimony of his or her out of court statement as incomplete or attempts to cross-examine the witness on additional parts of the statement, the court must make a discretionary determination regarding completeness as required by *Eugenio*. Additional portions of the defendant's statement are not inadmissible solely because the defendant chooses not to testify. State v. Anderson, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999).

The existence of a conspiracy under sub. (4) (b) 5. must be shown by a preponderance of the evidence by the party offering the statement. Bourjaily v. United States, 483 U.S. 171 (1987).

under sub. (4) (b) 4., a party introducing the statement of an agent as the admission of a principal need not show that the agent had authority to speak for the principal.

The rule only requires that the agent's statement concern "a matter within the scope of his agency or employment." Perzinski v. Chevron Chemical Co. 503 F. 2d 654.

Bourjaily v. United States: New rule for admitting coconspirator hearsay statements. 1988 WLR 577 (1988).

908.02 Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

History: Sup. Ct. Order, 59 Wis. 2d R1, R248 (1973).

The rule of completeness requires that a statement, including otherwise inadmissible evidence including hearsay, be admitted in its entirety when necessary to explain an admissible portion of the statement. The rule is not restricted to writings or recorded statements. State v. Sharp, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993).

Prisoner disciplinary hearings are governed by administrative rules that permit consideration of hearsay evidence. State ex rel. Ortega v. McCaughtry, 221 Wis. 2d 376, 585 N.W.2d 640 (Ct. App. 1998).

908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

(6m) HEALTH CARE PROVIDER RECORDS. (a) *Definition.* In this subsection, "health care provider" means a massage therapist or bodyworker issued a certificate under ch. 460, a chiropractor licensed under ch. 446, a dentist licensed under ch. 447, a physician assistant licensed under ch. 448, or a health care provider as defined in s. 655.001 (8).

NOTE: Par. (a) is shown as amended eff. 3–1–03 by 2001 Wis. Act 74. Prior to 3–1–03 it reads:

(a) *Definition.* In this subsection, "health care provider" means a massage therapist or bodyworker issued a license of registration under subch. XI of ch. 440, a chiropractor licensed under ch. 446, a dentist licensed under ch. 447, a physician assistant licensed under ch. 448 or a health care provider as defined in s. 655.001 (8).

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer health care provider records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian.

2. Notifies all appearing parties that an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(c) *Subpoena limitations.* Health care provider records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.

2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.

3. If upon a properly authorized request of an attorney, the health care provider refuses, fails or neglects to supply within 2 business days a legible certified duplicate of its records for the fees established under par. (d).

(d) *Fees.* After December 31, 2002, the department of health and family services shall, by rule, prescribe uniform fees that are based on an approximation of actual costs. The fees, plus applicable tax, are the maximum amount that a health care provider may charge for certified duplicate patient health care records. The rule shall also allow the health care provider to charge for actual postage or other actual delivery costs. For duplicate patient health care records and duplicate X–ray reports or the referral of X–rays to another health care provider that are requested before commencement of an action, s. 146.83 (1) (b) and (c) and (3m) applies.

Cross Reference: See also ch. HFS 117, Wis. adm. code.

(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) RECORDS OF VITAL STATISTICS. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) ABSENCE OF PUBLIC RECORD OR ENTRY. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) RECORDS OF RELIGIOUS ORGANIZATIONS. Statements of births, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law

to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) FAMILY RECORDS. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document. unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) STATEMENTS IN ANCIENT DOCUMENTS. Statements in a document in existence 20 years or more whose anthenticity is established.

(17) MARKET REPORTS. COMMERCIAL PUBLICATIONS. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) LEARNED TREATISES. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross–examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date ofpublication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to he offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject ofhistory, science or art shall he received in evidence unless the party proposing to offer the same shall, not later than **20** days after service of the notice described in par. **(a),** serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption. marriage, divorce, death, relationship by blood,' adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) REPUTATION AS TO CHARACTER. Reputation of a person's character among the person's associates or in the community.

(22) JUDGMENT OF PREVIOUS CONVICTION. Evidence Of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62 (3) (b), to prove any fact essential to sustain the judgment, hut not including, when offered by the state in a criminal prosecution for purposes other than impeachmcnt, judgments against persons other than the accused. The pendency of an appeal may he shown but does not affect admissibility.

(23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions hut having comparable circumstantial guarantees of trustworthiness.

History: Sup. Ct. Order, 59 Wis. 2d R250; Sup. Ct. Order, **67 Wis. 2d vii (1975);** 1983 a. 447; Sup. Ct. Order, 158 Wis. 20d xxv (1990); 1991 a. 32, 269; 1993 a. 105; **1995 a. 27 s. 9126 (19); 1997 a. 67, 156;** 1999 a. 32, 85, 162; 2001 a. 74, 109.

Judicial Council **Note, *1990*** Sub. (6m) **is repealed** and recreated to extend the **self-**authentication provision to **other** health cam providers in **addition** to **hospitals.** That such **records may** be authenticated without the testimony **of** their custodian **does** not obviate other proper objections to **their** admissibility. The revision **changes the** basic self–authentication procedure for all **health** care provider **records** (including **hospitals) by** requiring the records to **be** served on **all** parties or made reasonably **available** to **them** at least 40 days before **the trial** or hearing. **The additional 30 days facilitates responsive discovery, while elimination** of the filing **requirement** reduces courthouse **records** management impacts. [Re Order eff. 1–1–91]

Tho *res gestae* exception is given a broader **view when** assertions of a young **child** are **involved** and will allow admitting statements by **a child** victim **of a** sexual assault to a parent 2 days later. Bertrang v. **State,** *50* Wis. **2d** *702,* 184 N.W.2d **867 (1971).**

Hearsay **in a juvenile** court worker's report was not admissible under sub. *(6)* or **(8) at a delinquency hearing.** Rusecki v. State, 56 Wis. 2d **299,201** N.W.2d **832** (1972).

A medical record containing **a diagnosis** or **opinion** is admissible, **bur** may **he excluded** if the entry requires explanation or a detailed statement of judgmental factors. Noland v. Mutual of Omaha Insurance **Co.** 57 Wis. 2d **633,205** N.W.2d **388** (1973).

The statement of the operator that the press had repeated 3 times, which was made 5 minutes after the malfunction causing his injury, was admissible under the excited utterance exception to the hearsay rule. Nelson v. L. & J. Press Corp. 65 Wis. 2d 770, 223 N.W.2d 607 (1974).

Under the *res gestae* exception to the hearsay rule, the "excited utterance" exception under sub. (2), testimony by the victim's former husband that his daughter called him at 5 a.m. the morning after a murder and told him, "daddy, daddy, Wilbur killed mommy," was admissible. State v. Davis, 66 Wis. 2d 636, 225 N.W.2d 505 (1975).

The official minutes of a highway committee were admissible under sub. (6) as "records of regularly conducted activity." State v. Nowakowski, 67 Wis. 2d 545, 227 N.W.2d 697 (1975).

A public document, filed under oath and notarized by the defendant, was one having "circumstantial guarantees of trustworthiness" under sub. (24). State v. Nowakowski, 67 Wis. 2d 545, 227 N.W.2d 697 (1975).

Statements made by a 5–year –old child to his mother one day after an alleged sexual assault by the defendant were admissible under the excited utterance exception to the hearsay rule, since a more liberal interpretation is provided for that exception in the case of a young child alleged to have been the victim of a sexual assault. State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W.2d 890 (1975).

Probation files and records are public records and admissible at a probation revocation hearing. State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35, 242 N.W.2d 227 (1976).

A statement made by a victim within minutes after a stabbing that the defendant "did this to me" was admissible under sub. (2). La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 794 (1976).

Personal observation of a startling event is not **required** under sub. **(2). State** v. *Lenarchick,* **74 Wis. 2d 425.247** *N.W.2d* 80 *(1976).*

Admission of hospital **records did** not deprive **the** defendant **of the** right to confrontation. State v. Olson, **75** Wis. 2d **575,250** N.W.2d 12 **(1977).**

Observations made by a prior trial judge in a decision approving the jury's award of damages were properly excluded as hearsay in a later trial. Johnson v. American Family Mutual Insurance Co. 93 Wis. 2d 633, 287 N.W.2d 729 (1980).

Medical **records** as **explained** to **the jury** by a medical student were sufficient to support a conviction; **the right** to confrontation was not denied. Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981).

A chiropractor could testify as to a patient's self–serving statements when those statements were used to form his medical opinion under sub. (4). Klingman v. Kruschke, 115 Wis. 2d 124, 339 N.W.2d 603 (Ct. App. 1983).

An interrogator's account of a child witness's out of court statements made four days after a murder, when notes of the conversation were available although not introduced, was admissible under sub. (24). State v. Jenkins, 168 Wis. 2d 175, 483 N.W.2d 262 (1992).

A defendant has a burden of production to come forward with some evidence of a negative defense to warrant jury consideration. State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

For a statement to be an excited utterance there must be a "startling event or condition" and the declarant **must** have **made** the statement "while **under** the stress of excitement caused by the event or condition." **Stare** v. Boshcka, 173 Wis. **2d 387** reprinted at 178 Wis. 2d 628, **496** N.W.2d **627** (Ct. **App.** 1992).

When proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception, the confrontation clause **is satisfied. Stale** v. Patino, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. **App.** 19931.

In applying the **excited** utterance exception in child sexual assault cases, a court **must consider** factors including the **child's** age and the contemporaneousness **and** spontaneity **of** the assertions in relation **to** the **alleged** assault. In **applying** the sub. (24) residual exception in such a case, **the** court must consider the attributes **of** the child. the person to **whom** the statement was **made,** the circumstances under which the statement **was made.** the content of the statement **and** corroborating **evidence.** State v. **Gerald L.C. 194** Wis. 2d **549,535** N.W.2d **777** (Ct. **App.** 1995).

The sub. (2) **excited** utterance **and** the **sub.** (24) residual exceptions are discussed in relation to child sexual assault **cases.** State v. Huntington, 216 Wis. 2d 671, 575 N.W.2d 268 (1998).

The hearsay **exception** for **medical** diagnosis or treatment **under sub.** (4) does not **apply** to statements made to counselors **or social** workers. **State v. Huntington,** 216 Wis. **2d** 671.875 N.W.2d **268** (1998).

The requirement in sub. (18) that the writer of a statement in a treatise be recognized as an expert is not met by finding that the periodical containing the article was authoritative and reliable. Broadhead v. State Farm Mutual Insurance Co. 217 Wis. 2d 231, 579 N.W.2d 761 (Ct. App. 1998).

The description of the effects of alcohol on a person contained in the Wisconsin Motorists Handbook produced by the Department of Transportation was admissible under sub. (8). Sullivan v. Waukesha County, 218 Wis. 2d 458, 578 N.W.2d 596 (1998).

Evidence of 911 calls, including tapes and transcripts of the calls, is not inadmissible hearsay. Admission does not violate the right to confront witnesses. State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999).

A state crime lab report prepared for a prosecution was erroneously admitted as a business record under sub. (6). State v. Williams, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919.

Portions **of** investigatory reports containing opinions or conclusions are **admissible under** the sub. (8) **exception** Beech Aircraft **Carp.** v. Rainey, **488** U.S. 153, 102 L. **Ed.** 2d 445 (1988).

Convictions through hearsay in child sexual abuse **cases.** Tuerkheimer. **72 MLR 47 (1988).**

Children's out–of–court statements. Anderson, 1974 WBB **No.** 5.

Evidence review: Past recollections refreshed v. past recollection **recorded.** Fine. **WBB** March 1984.

Evidence review – Business records and government reports: Hearsay Trojan horses? Fine. WBB April 1984.

Medical records discovery in Wisconsin personal injury litigation. 1974 WLR 524.

908.04 Hearsay exceptions; declarant unavailable: definition of unavailability. (1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

(c) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(d) Is unable to he present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose ofpreventing the witness from attending or testifying.

History: Sup. Ct. Order, 59 Wis. 2d R1, **K302** (1973);1991 a 32

Adequate medical evidence of probable psychological trauma is required to support an unavailability finding based on trauma, absent an emotional breakdown on the witness stand. State v. Sorenson, 152 Wis. 2d 471, 449 N.W.2d 280 (Ct. App. 1989).

The state must show by a preponderance of the evidence that the declarant's absence is **due** to the defendant's misconduct **under sub.** (2). State v. Frambs. 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990).

4 finding **of** unavailability **of a** witness **due** to mental illness, made **on** the basis **of** a confused and stale **record.** deprived the defendant of the right to confront witnesses. but the error was harmless. Burns v. Clusen, 599 **F. Supp.1438** (1984).

908.045 Hearsay exceptions; declarant unavailable. The following are *not* excluded by *the* hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same **or** a different proceeding, or in a deposition taken in compliance with law in the course ofanother proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross–, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2) STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

(3) STATEMENT **UNDER** BELIEF OF IMPENDING DEATH. A statement made by a declarant while helicving that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to he the declarant's impending death.

(4) STATEMENT AGAINST INTEREST. A statement which **was** at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim hy the declarant against another **or** to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

(5) STATEMENT OF PERSONAL **OR** FAMILY HISTORY **OF** DECLARANT. A statement concerning the declarant's **own** birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact ofpersonal or family history, even though declarant had no means **of** acquiring personal knowledge of the matter stated.

(5m) STATEMENT **OF PERSONAL OR FAMILY HISTORY OF PERSON** OTHER **THAN THE DECLARANT** A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact ofpersonal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to he likely to have accurate information concerning the matter declared.

(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions hut having comparable circumstantial guarantees of trustworthiness.

History: *Sup. Ct. Order,* 59 Wis. 2d R1, R308 *(1973); 1975 c. 94 s. 91 (12);* **1975** c. 199; 1983 a. 447; 1991 a. 32; 1999 a. 85.

A good–faith effort **to** obtain a witness's presence at trial is a prerequisite to finding that the witness is "unavailable" **for** purposes **of invoking** the hearsay exception respecting former testimony. **La Barge** v. State, **74** Wis. 2d **327, 246** N.W.2d **794** (1976).

The defendant's right **of** confrontation was **not** violated when preliminary examination **testimony of** a deceased witness was admitted at trial since the **defendant had** an unlimited opportunity to cross–examine the witness **and** the testimony **involved** the same issues **and** parties as at trial. Nabbefeld v. State, **83** Wis. 2d 515, **266** N.W.2d 292 (1978).

A statement against penal interest may **he admissible under** sub. **(4)** if 4 factors indicating trustworthiness of the Statementare **present.** Ryan v. **Stale,** 95 Wis. 2d 83, 289 N.W.2d 349 (Ct. App. 1980).

4 finding of unavailability of **a** witness **due** to mental illness, made **on** the basis of a confused and stale **record, deprived** the **defendant** of the right to confront the witness. State v. Zellmer, 100 Wis. 2d 136,301N.W.2d 209 (1981).

Corroboration **under** rub. (4) **must he sufficient** to permit a reasonable person to **conclude,** in light of all the facts **and** circumstances, that the statement could be true. State v. Anderson, 141 Wis. 2d 653, 416 N.W.2d 276 (1987).

Under the "totality of factors" test, statements by **a** 7–year–old sexual abuse victim **m a social worker** possessed sufficient guarantees *of* trustworthiness to *he* **admissible under** sub. *(6)* at a preliminary hearing. **Stale** v. Sorenson, 143 Wis. 2d 226, **421** N.W.2d 77 (1988).

The exception for a statement of recent perception under sub. (2) does not apply to the aural perception of an oral statement privately told to a person. State v. Stevens, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992).

The **exception under** sub. (4) for a statement that makes the declarant an **object of** hatred, **ridicule or** disgrace requires that the declarant have a personal interest in keep-

ing the statement secret. State v. Stevens, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992).

The similar motive and interest requirement of sub. (1) is discussed. State v. Hickman, 182 Wis. 2d 318, 513 N.W.2d 657 (Ct. App. 1994).

The sub. (6) residual exception should be applied only to novel or unanticipated categories of hearsay. The testimony of a 5-year-old girl against her mother fell within the sub. (6) exception when there were adequate assurances of trustworthiness. Requiring the girl to incriminate her mother at trial presented an exigency similar to the psychological scarring of a child victim. State v. Petrovic, 224 Wis. 2d 477, 592 N.W.2d 238 (Ct. App. 1999).

There are objective and subjective poles to the "social interest" exception under sub. (4) for statements that would subject the declarant to hatred, ridicule, or disgrace. The objective pole is the determination that the declarant actually faced a risk of hatred, ridicule, or disgrace. The subjective pole is the declarant's appreciation of that risk. State v. Murillo, 2001 WI App 11, 240 Wis. 2d 666, 623 N.W.2d 187.

If a hearsay statement falls within a firmly rooted hearsay exception, it is automatically admitted; such statements are reliable without cross-examination. Hearsay that is not within a firmly rooted exception requires "particularized showings of trustworthiness" to be admitted. The social interest exception under sub. (4) is not firmly rooted, but there were sufficient showings of trust worthiness in this case. State v. Murillo, 2001 WI App 11, 240 Wis. 2d 666, 623 N.W.2d 187.

Corroboration requirement for statements against penal interest. 1989 WLR 403 (1989).

908.05 Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter.

History: Sup. Ct. Order, 59 Wis. 2d R1, R323 (1973).

The admission of double hearsay did not violate the defendant's right to confront witnesses. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976).

Evidence of 9-1-1 calls, including tapes and transcripts of the calls, is not inadmissible hearsay. Admission does not violate the right to confront witnesses. State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999).

908.06 Attacking and supporting credibility of declarant. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

History: Sup. Ct. Order, 59 Wis. 2d R1, R325 (1973); 1991 a. 32.

908.07 Preliminary examination; hearsay allowable. A statement which is hearsay and which is not otherwise excluded from the hearsay rule under ss. 908.02 to 908.045, may be allowed in a preliminary examination as specified in s. 970.03 (11).

History: 1979 c. 332

908.08 Videotaped statements of children. (1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearingunders. 302.113 (9) (am), 302.114 **(9)** (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the videotaped oral statement of a child who is available to testify, as provided in this section.

NOTE: Sub. (1) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 304.06 (3) or 973.10 (2), the court or hearing examiner may admit into evidence the videotaped oral statement of a child who is available to testify, as provided in this section.

(2) (a) Not less than 10 days prior to the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the videotape camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the videotape prior to the hearing under par. (b).

(b) Prior to the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or prior to the hearing, the court shall view the videotape. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the courtshall enter an order for editing as provided in s. 885.44 **(12).**

(3) The court or hearing examiner shall admit the videotape statement upon finding all of the following:

(a) That the trial or hearing in which the videotape statement is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests ofjustice warrant its admission under sub. (4).

(b) That the videotape is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests ofjustice warrant the admission of a videotapc statement of a child who is at least 12 years of age but younger than I6 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological ape, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child bad a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares. enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the videotape statement would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5) (a) If the court or hearing examiner admits a videotape statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediatcly after the videotape statement is shown to the trier of fact.

Except as provided in par. (b), if that party docs not call the child, the court or hearing examiner, upon request hy any other party, shall order that the child be produced immediately following the showing of the videotape statement to the trier of fact for cross–examination.

(am) The testimony of a child tinder par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a videotape statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers tho statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross–examination at the preliminary examination.

(6) Videotaped oral statements *of* children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

(7) **At** a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence a videotape oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

History: 1985 a. 262; 1989 a. 31; 1993 a. 98; 1995 a. 77, 387; 1997 a. 319; 2001 a. 109.

Judicial Council Note, 1985: *See* the legislative purpose clause in Section 1 of this act.

Sub. (1) limits this hearsay exception to criminal trials and hearings in criminal, juvenile and probation or parole revocation cases at which the child is available to testify. Other exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045, stats. Sub. *(5)* allows the proponent to call the child to testify and other parties to have the child called for cross–examination. The right of a criminal defendant to cross–examine the declarant at the trial or hearing in which the statement is admitted satisfies constitutional confrontation requirements. California v. Green, 399 U.S. 149, 166 and 167 (1970); State v. Burns, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983). A defendant who exercises this right is not precluded from calling the child as a defense witness.

Sub. (2) requires a pretrial offer of proof and a hearing at which the court or hearing examiner must rule upon objections to the admissibility of the statement in whole or in part. These objections may be based upon evidentiary grounds or upon the requirements of sub. (3). If the trial is to be to a jury, the videotape must be edited under one of the alternatives provided in s. 885.44 (12), stats.

Sub. (3) (a) limits the applicability of this hearsay exception to trials and hearings which commence prior to the child's 16th birthday. If the trial or hearing commences after the child's 12th birthday, the court or hearing examiner must also find that the interests of justice warrant admission of the statement. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (4).

Sub. (6) refers to the statutes making videotaped oral statements of children discoverable prior to trial or hearing. [85 **Act** 262]

Sub. ***(5)*** doer not violate due process. State v. Tarantino, 157 Wis. 2d 199, **458** N.W.2d 582 (Ct. **App.** 1990).

Interviewers need not extract the exact understanding that "false statements are punishable" in order to meet the requirement of sub. (3) (c), if the tape, assessed in its totality, satisfies the requirement. State v. Jimmie R.R. 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196.

CHAPTER 909

EVIDENCE — AUTHENTICATION AND IDENTIFICATION

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chr. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

909.01 General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims

History: Sup. Ct. Order, 59 Wis. 2d R1, R329 (1973); 1975 c. 41.

Unauthenticated ledger and signature cards bearing the entry "P.O.D. to (plaintiff)" were not competent evidence of the decedent's intent to make a savings and loan account payable on death to the plaintiff. Bruckner v. Prairie Fed. Savings & Loan Association, 81 Wis. 2d 215, 260 N.W.2d 256 (1977).

Before a demonstrative videotape may be admitted, there must be a foundation that it is a fair and accurate reproduction of what was seen and that it was produced under conditions reasonably similar to conditions of the actual event. Even with the foundation established, the evidence **may be excluded on a finding** that its probative value **is outweighed by** its prejudicial **effect.** State v. **Peterson,** 222 Wis. 2d 449, 588 N.W.2d **84 (Ct.** App. 1998).

909.015 General provision; illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of s. **909.01:**

(1) TESTIMONY OF WITNESS WITH **KNOWLEDGE.** Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) NONEXPERT OPINION ON HANDWRITING. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) COMPARISON BY TRIER OF **FACT OR EXPERT** WITNESS. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) DISTINCTIVE CHARACTERISTICS **AND THE LIKE.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) VOICE **IDENTIFICATION.** Identification Of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) TELEPHONE CONVERSATIONS. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telecommunications company to a particular person or business, if:

(a) In the case of a person, circumstances, including self. identification, show the person answering to be the one called; or

(b) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) PUBLIC RECORDS OR **REPORTS.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form; is from the public office where items of this nature are kept.

(8) ANCIENT DOCUMENTS OR DATA COMPILATIONS. Evidence that a document **or** data compilation, in any form:

(a) Is in a condition that creates no suspicion concerning its authenticity;

(b) Was in a place where it, ifauihentic, would likely be; and

(c) Has been in existence **20** years or more at the time it is offered.

(9) PROCESSORSYSTEM. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) METHODS PROVIDED **BY STATUTE** OR **RULE.** Any method of authentication or identification provided by statute or by other rules adopted by the supreme court.

History: Sup. Ct. Order, 59 Wis. 2d R1. R332 (1973); 1985 a. 297; 1999 a. 85.

Alleged statements of self-identification made in a phone call **and in** personal contact may not themselves **be used to** identify the speakers. Nischke v. Farmers **& Merchants Bank, IX** i Wis. 2d 96, 522 N.W.2d 542 (Ct. App. **1994).**

Tapes are properly identified **and** authenticated when **a party to the recorded** conversation **identifies** the **defendant's** voice **and** testifies that the tapes **accurately depict** the conversation. Stare v. Curtis, **218** Wis. 2d 550, 582 N.W.2d 409 **(Ct. App.** 1998).

909.02 Self-authentication. Extrinsic evidence of authenticity as a condition prccedcnt to admissibility is not required with respect to any of the following:

(1) PUBLIC DOCUMENTS UNDER **SEAL. A** document bearing a seal purporting to be that of the United States, or of any **state,** district, commonwealth, temtory, or **insular** possession thereof, **or** the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of apolitical subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(2) PUBLIC **DOCUMENTS NOT UNDER** THE **SEAL. A** document purporting to bear the signature in the official capacity of an officer or employee of any entity included in sub. (1), having no seal, if a public officer having a seal and having official duties in' the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) PUBLIC DOCUMENTS OF **FOREIGN COUNTRIES. A** document purporting to be executed or attested in **his** or her official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of the executing or attesting person, or of any foreign official whose certiiicate ofgenuineness of signature and officialposition relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. **A** final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Ifreasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) CERTIFIED COPIES OF PUBLIC RECORDS. A Copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct hy the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3) or complying with any statute or rule adopted by the supreme court.

(5) OFFICIAL **PUBLICATIONS.** Books, pamphlets or other publications purporting to be issued by public authority.

(6) NEWSPAPERS AND PERIODICALS. Printed materials purporting to be newspapers or periodicals.

(7) TRADE INSCRIPTIONS AND THE LIKE. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) ACKNOWLEDGED AND AUTHENTICATED DOCUMENTS~ Documents accompanied by a certificate of acknowledgment under the hand and seal or rubber stamp of a notaiy public or other person authorized by law to take acknowledgments or any public officer entitled by virtue of public office to administer oaths or authenticated or acknowledged as otherwise authorized by statute.

(9) COMMERCIAL PAPER AND RELATED DOCUMENTS~ Commercial paper, signatures thereon. and documents relating thereto to the extent provided by chs. 401 to 411.

(10) STATUTORY RULES. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic:

(11) HEALTH CARE PROVIDER RECORDS. Records served upon or made available to ail parties under s. 908.03 (6m).

History: Sup. Ct. Order, 59 Wis. 2d R1, R340 (1973); Sup. Ct. Order, 67 Wis. 2d 585, viii (1975); 1975 c. 200; 1979 c. 89; Sup. Ct. Order, 158 Wis. 2d xxv (1990); 1991 a. 32, 148, 304, 315; 1999 a. 85.

The trial court erred in applying the certification requirement under s. 889.08 (1) to the defendant's driving record that was certified under sub. (l). State v. Leis. 134 Wis. 2d 441, 397 N.W.2d 498 (Ct. App. 1986).

A copy of an official record may be admitted in evidence if it is certified as correct in accordance with sub. *(1)* even though the certification does not comply with s. 889.08 (1). *63* Atty. Gen. 605

909.03 Subscribing witness' testimony unnecessary. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

History: sup. Ct. Order, 59 Wis. 2d R1, R349 (1973).

CHAPTER 910

EVIDENCE — CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

NOTE Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

910.01 Definitions. For purposes of this chapter the following definitions are applicable.

(1) WRITINGS AND RECORDINGS. "Writings" and "recordings" consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) PHOTOGRAPHS, "Photographs" include still photographs, X–ray films, and motion pictures.

(3) ORIGINAL. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) DUPLICATE. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

History: Sup. Ct. Order, 59 Wis. 2d R1, R351 (1973); 1995 a. 225.

910.02 Requirement of original. To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911 or by statute.

History: Sup. Ct. Order, *59* Wis. 2d R1, R354 (1973); 1981 c. *390*

There is no "best evidence rule" applicable to photographs of objects that requires that the object itself be introduced rather than the photograph. A photograph of a wrench bearing the owner's initials and found in defendant's automobile was relevant. Anderson v. State, 66 Wis. 2d 233, 223 N.W.2d 879 (1974).

910.03 Admissibility of duplicates. A duplicate is admissible *to* the same extent as an original unless (1) a genuine question is raised as *to* the authenticity of the original or *(2)* in the circumstances it would he unfair *to* admit the duplicate in lieu of the original.

History: Sup. Ct. Order, 89 Wis. 2d R1, R356 (1973).

Photostatic copies of hospital records were admissible under this section. Schulz v. St. Mary's Hospital, XI Wis. 2d 638,260 N.W.2d 783 (1978).

910.04 Admissibility of other evidence of contents. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissibie if:

(1) ORIGINALS LOST OR DESTROYED. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in had faith; or

(2) ORIGINAL NOT OBTAINABLE. No original can he obtained by any available judicial process or procedure: or

(3) ORIGINAL IN POSSESSION OF OPPONENT. At a time when an original was under the control of the party against whom offered. the parry was put on notice, by the pleadings or othenvise, that the contents would hc a subject of proof at the hearing, and the party does not produce *the* original at the hearing; or

(4) COLLATERAL MATTERS. The writing, recording or photograph is not closely related to a controlling issue,

History: Sup. Ct. Order, 59 Wis. 2d R1, R357 (1973); 1991 u.32.

910.05 Public records. The contents of an official record, or of a document authorized to he recorded or filed and actually recorded or filed. including data compilations in any form, if othenvise admissible, may be proved by copy, certified as correct in accordance with s. 909.02 or testified *to* be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

History: Sup. Cf. Order, 59 Wis. 2d R1. R361 (1973).

910.06 Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently he examined in court may he presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they he produced in court.

Hisfory: Sup. Ct. Order, 59 Wis. 2d R1, R362 (1973).

A chart prepared by the prosecutor during trial, in the jury's presence, to categorize testimony was not a summary under this section, but was a "pedagogical device" admissible within the court's discretion under s. 906.11. State v. Olson, 217 Wis. 2d 730,579 N.W.2d 802 (Ct. App. 1998).

910.07 Testimony or written admission of party. Contents of writings, recordings or photographs may he proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

History: Sup. Ct. Order, 59 Wis. 2d R1, R363 (1973); 1991 a. *32*

910.08 Functions of judge and jury. When the admissibility of other evidence of contents of writings, recordings or photographs under chs. 901 to 911 depends upon the fulfillment of a condition of fact. the question of whether the condition has been fulfilled is ordinarily for the judge to determine. However, when any of the following issues is raised, the issue is for the mer of fact to dctcrmine as in the case of other issues of fact:

(1) Whether the asserted writing ever existed.

(2) Whether another writing, recording or photograph produced at the trial is the original.

(3) Whether other evidence of contents correctly reflects the contents.

History: Sup. Ct. Order, 59 Wis. 2d R1, R364 (1973); 1993 a. 213.

CHAPTER 911

EVIDENCE — MISCELLANEOUS RULES

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 W (2d). The court did not adopt the comments but ordered them printed with the rules for information purposes.

911.01 Applicability of rules of evidence. (1) COURTS AND COURT COMMISSIONERS. Chapters 901 to 911 apply to the courts of the state of Wisconsin, including municipal courts and circuit, supplemental, and municipal court commissioners, in the proceedings and to the extent hereinafter set forth except as provided in s. 972.11. The word "judge" in chs. 901 to 911 means judge of a court of record, municipal judge, or circuit, supplemental, or municipal court commissioner.

(2) PROCEEDINGS GENERALLY. Chapters 901 to 911 apply generally to proceedings in civil and criminal actions.

(3) PRIVILEGES; OATH. Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings; s. 906.03 applies at all stages of all actions, cases and proceedings except as provided in ss. 901.04 (1) and 911.01 (4), and ch. 908.

(4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:

(a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04 (1).

(b) *Grand jury; John Doe proceedings.* Proceedings before grand juries or a John Doe proceeding.

(c) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, granting or revoking probation, modification of a bifurcated sentence under s. 302.113 (9g), adjustment of a bifurcated sentence under s. 973.195 (1r), issuance of arrest warrants, criminal summonses and search warrants; proceedings under s. 971.14 (1) (c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969.

(d) *Small claims actions.* Proceedings under ch. 799, except jury trials.

(5) RESTITUTION HEARINGS. (a) In a restitution hearing under s. 973.20 (13), the rules of evidence are subject to waiver under s. 973.20 (14) (d).

(b) When hearing evidence as to the factors that determine a restitution order under s. 800.093, the rules of evidence are subject to waiver under s. 800.093 (8) (b).

History: Sup. Ct. Order, 59 Wis. 2d R1, R366 (1973); 1977 c. 305 s. 64; 1977 c. 345; 1979 c. 32 s. 92 (16); 1981 c. 183, 367, 390, 391; 1987 a. 208, 398; 1991 a. 40, 269; 2001 a. 61, 109.

Judicial Council Committee's Note, 1981: Sub. (4) (c) has been amended to exempt so–called McCredden hearings under s. 971.14 (1) (c) from the rules of evidence. [Bill 765–A]

911.02 Title. Chapters 901 to 911 may be known and cited as the Wisconsin Rules of Evidence.

History: Sup. Ct. Order, 59 Wis. 2d R1, R377 (1973).

CHAPTER 939
CRIMES — GENERAL PROVISIONS

Cross-reference: *See* definitions **ins.** 939.22.

NOTE: 1987 Wis. Act 399 included changes in homicide and lesser included offenses. The sections affected had previously passed the senate as 1987 Senate Bill 191, which was prepared by the Judicial Council and contained explanatory notes. These notes have been inserted following the sections affected and are credited to SB 191 as "Bill 191-S". These notes do not appear in the 198748 edition of the Wisconsin Statutes

SUBCHAPTER I
PRELIMINARY PROVISIONS

939.22 Words and phrases defined. In chs. 939 to 948 and 951, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction or the word or phrase is defined in s. 948.01 for purposes of ch. 948:

(2) "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas.

(3) "Alcohol concentration" has the meaning given in s. 340.01 (1v).

(4) "Bodily harm.' means physical pain or injury, illness, or any impairment of physical condition.

(6) "Crime" has the meaning designated in s. 939.12.

(8) "Criminal intent" has the meaning designated in s. 939.23.

(9) "Criminal gang" means an ongoing organization, association or group of 3 or more persons, whether formal or informal, that has as one of its primary activities the commission of one or more of the criminal acts, or acts that would be criminal if the actor were an adult, specified in s. 939.22 (21) (a) to (s); that has a common name or a common identifying sign or symbol; and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(9g) "Criminal gang member" means any person who participates in criminal gang activity, as defined in s. 941.38 (1) (b), with a criminal gang.

(10) "Dangerous weapon'. means any firearm. whether loaded or unloaded; any device designed as **a** weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

(11) "Drug" has the meaning specificd in s. 430.01 (10).

(12) "Felony" has the meaning designated in s. 939.60.

(14) "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(16) "Human being" when used in the homicide sections means one who has been born alive.

(18) "Intentionally" has the meaning designated in s. 939.23.

(19) "Intimate parts" mcans the breast, buttock. anus, groin. scrotum, penis, vagina or pubic mound of a human being.

(20) "Misdemeanor" has the meaning designated in s. 939.60.

(21) "Pattern of criminal gang activity" mcans the commission of. attempt to commit or solicitation to commit 2 or more of the following crimes, or acts that would be crimes if the actor were an adult, at least one of those acts or crimes occurs after December 25, 1993, the last of those acts or crimcs occurred within 3 years after a prior act or crime, and the acts or crimes are committed, attempted or solicited on separate occasions or by **2** or more persons:

(a) Manufacture, distribution or delivery of a controlled substance or controlled substance analog, as prohibited in s. 961.41 (1).

(b) First-degree intentional homicide, as prohibited in s. 940.01

(c) Second-degree intentional homicide, as prohibited in s. 940.05.

(d) Battery, as prohibited in s. 940.19 or 940.195.

MOTE. Par. (d) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:

(d) Battery, substantial battery or aggravated battery, as prohibited in s. 940.19 or 910.195.

(c) Battery, special circumstances, as prohibited in s. 940.20.

(em) Battery or threat to witness, as prohibited in s. 940.201

(f) Mayhem, as prohibited in s. 940.21

(g) Sexual assault, as prohibited in s. 940.225.

(h) False imprisonment, as prohibited in s. 940.30.

(i) Taking hostages, as prohibited in s. 940.305.

(j) Kidnapping, as prohibited in s. 940.31

(k) Intimidation of witnesses, as prohibited in ***s.*** 940.42 or 940.43.

(L) Intimidation of victims, as prohibited **in** s. 940.44 **nr** 940.45.

(m) Criminal damage to property, as prohibited in s. 943.01.

(mg) Criminal damage to or threat to criminally damage the property of a witness, as prohibited in s. 943.011 or 943.017 (2m).

(n) Arson of buildings or damage by explosives, as prohibited in s. 943.02.

(o) Burglary, as prohibited in s. 943.10.

(p) Theft, as prohibited in s. 943.20.

(q) Taking, driving or operating a vehicle, or removing a pan or component of a vehicle, without the owner's consent, as prohibited in s. 943.23.

(r) Robbery, as prohibited in s. 943.32.

(s) Sexual assault of a child, as prohibited in s. 948.02.

(t) Repeated acts of sexual assault of the same child, as prohibited in s. 948.025.

(22) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimcs.

(24) "Place of prostitution" means any place where a person habitually engages, in public or in private, in non-marital acts of sexual intercourse, sexual gratification involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact for anything of value.

(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.

(30) "Public officer": "public employee". A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units. A "public employee.' is any person, not an officer, who performs any official function on behalf of the State or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate govemmcntal unit.

(32) "Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the Circumstances is reasonable even though erroneous.

(34) "Sexual contact" mcans the intentional touching ***of*** the clothed or unclothed intimate parts of another pcrson with any part of the body clothed or unclothed or with any object or device, the intentional touching of any part of the body clothed or unclothed

of another person with the intimate parts of the body clothed or unclothed, or the intentional penile ejaculation of ejaculate or intentianal emission of urine or feces upon any part of the body clothed or unclothed of another person. if that intentional touching, ejaculation or emission is for the purpose of sexual humiliation, sexual degradation, sexual arousal or gratification.

(36) "Sexual intercourse" requires only vulvar penetration and does not require emission.

(38) "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches: any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

(40) "Transfer" means any transaction involving a change in possession of any property, or a change of right, title, or interest to or in any property.

(42) "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol bcvcragc, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, controlled substance and controlled substdncc analog, or of any other drug or of an alcohol beverage and any other drug.

(44) "Vehicle" means any self–propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water. or in the air.

(46) "With intent" has the meaning designated in s. 939.23.

(48) "Without consent" means no consent in fact or that consent is given for one of the following reasons:

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on the victim. or on a person in the victim's presence, or on a member **of** the victim's immediate family; or

(b) Because the actor purports to be acting under legal authority; or

(c) Because the victim does not understand the nature of the thing to which the victim consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth **or** defective mental condition, whether permanent or temporary.

History: 1971 c. 219; 1973 c. 336; 1977 c. 173; 1979 c. 89, 221; 1981 c. 79 s. 17; 1981 c. 89, 348; 1983 a. 17, 459; 1985 a. 146 s. 8; 1987 a. 332, 399; 1993 a. 98, 213, 227, 441, 486; 1995 a. 69, 436, 448; 1997 a. 143, 295; 2001 a. 109.

It was for the jury to determine whether a soft drink bottle, with which the victim was hit on the **head. constituted** a dangerous weapon. Actual injury to the victim is not required. Langston v. State, 61 Wis. 2d 288, 212 N.W.2d 113 (1973).

An unloaded pellet gun qualifies as a "dangerous weapon" under sub.10) in that it was designed as a weapon and, when used as a bludgeon, is capable of producing great bodily harm. State v. Antes, 74 Wis. 2d 317, 246 N.W.2d 671 (1976).

A jury could reasonably find that numerous cuts and stab wounds constituted "serious bodily injury" under sub.14) even though there was no probability of death, no permanent injury, and no damage to any member or organ. La Barge v. **State.** 74 Wis. 2d 327. 246 N.W.2d 794 (1976).

A jury must find that acts of prostitution **were** repeated or **were** continued in **order** to find that premises are "a place of **prostitution"** under sub.24). Johnson v. State, 76 Wis. 2d 672, 251 N.W.2d 834 (1977).

Sub.14), either on its face or as construed in *La Barge*, is not unconstitutionally vague. Cheatham v. State, *85* Wis. 2d 112,270 N.W.2d 194 (1978).

Definitions of "under the influence" in this section **and** in s. 346.63 **(1)**(a) are equivalent. State v. Waalen, 130 Wis. 2d 18, 386 N.W.2d 47 (1986).

To **determine** whether an infant was "born alive" under sub.16), the s. 146.71 standard to determine death is applied, as, "if one is not dead he is indeed alive." **State** v. Cornelius, 152 Wis. 2d 272. **448** N.W 2d **434** (Ct. **App.** 1989).

A dog may be a dangerous weapon under sub.10). State v. Sinks, 168 Wis. 2d 244, 483 N.W.2d 286 (Ct. App. 1992).

Portions of the defendant's anatomy are not **dangerous** weapons under sub.10). State v. Frey, 178 Wis. 2d 729, 505 N.W.2d 786 (Ct. App. 1993).

An automobile may constitute a dangerous weapon under sub.10). State v. Bidwell, 200 Wis. 2d 200. 546 N.W.2d 507 (Ct. App. 1996).

A firearm with a trigger **lock** is within the definition of a dangerous weapon **under** sub.10). State v. Norris, 214 Wis. 2d 25, 571 N.W.2d 857 (Ct. App. 1997).

When a mother agreed to the father taking a child on a camping trip, but the **father** actually intended to permanently take the child and did abscond to Canada with the child, the child was taken based on the mother's "mistake of fact," which under s. 939.22 (48) rendered the taking of the child to be "without consent" and in violation of s. 948.31. State v. Inglin, 224 Wis. 2d 764, 592 N.W.2d 666 (Ct. App. 1999).

The definitions in subs. (9) and (9g) are sufficiently specific that when incorporated into a probation condition they provide fair and adequate notice as to the expected course of conduct and provide an adequate standard of enforcement. State v. Lo, 228 Wis. 2d 531, 599 N.W.2d 659 (Ct. App. 1999).

SUBCHAPTER III
DEFENSES TO CRIMINAL LIABILITY

939.48 Self–defense and defense of others. (1) A person is privileged to threaten or intentionally use force against another for the purpose of prcvcnting or terminating what the pcrson reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor rcasonably believes is necessary to prevent or terminate the intcrfcrcncc. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himselfor herself.

(2) Provocation affects the privilege of self–defense as follows:

(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self–defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self–defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.

(b) The privilege lost by provocation may he regained if the actor in good faith withdraws from the fight and gives adequate notice thereofto his or her assailant.

(c) **A** person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self–defense.

(3) The privilege of self–defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first–degree or 2nd–degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or tire, first–dcgrcc or 2nd–degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one ofthosc crimes is committed.

(4) A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the third person would be privileged to act in self–defense and that the person's intervention is necessary for the protection of the third person.

(5) A person is privileged to use force against another if the person reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

History: 1987 a. 399; 1993 a. 486.

Judicial Council Note, 1988: Sub.3) is amended by conforming references to the statute titles as affected by this bill. [Bill 191–S]

When a defendant testified that he did not intend to shoot or use force, he could not claim self–defense. Cleghorn v. State, ***55*** Wis. 2d 466, 198 N.W.2d 477 (1972).

Sub.2) (b) is inapplicable to a defendant if the nature of the initial provocation is a gun-in-hand confrontation of an intended **victim** by a self–identified robber. Under these circumstances the intended victim is justified in the use of force in the exercise of the right of self–defense. Ruff v. **State.** 68 Wis. 2d 713. 223 N.W.2d 446 (1974).

Whether a defendant's belief was reasonable under subs.1) and **(4) depends.** in part, **upon** the parties' personal characteristics and **histories** and whether events were continuous. State v. Jones. 147 Wis. 2d 806, 434 N.W.2d 380 (1989).

Evidence of prior specific instances of violence **hat** were known to the accused may be presented to support a defense ***of*** self–defense. The evidence is not limited to the accused's own testimony, but the **evidence** may not be extended to the **point** that it is being offered to prove that the victim acted in conformity with his or her violent **tendencies. State** v. Daniels, 160 Wis. 2d 85, 465 N.W.2d 633 (1991)

Imperfect self–defense contains an initial threshold element requiring a reasonable belief that the defendant was terminating an unlawful interference with his or her person. State v. Camacho, 176 Wis. 2d 860, 501 N.W.2d 380 (1993).

The reasonableness of a person's belief under sub. 1) is judged from the position of a person of ordinary intelligence and prudence in the same situation as the defendant, not a person identical to the defendant placed in the same situation as the defendant. A defendant's psycho–social history showing past violence toward the defendant is generally not relevant to this objective standard, although it may be relevant, as in spousal abuse cases, where the actors are the homicide victim and defendant. State v. Hampton, 207 Wis. 2d 369, 558 N.W.2d 884 (Ct. App. 1996).

The right to resist unlawful arrest is not part of the statutory right to self defense, but is a common law privilege, which is abrogated. State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998).

While there is no statutory duty to retreat, whether the opportunity to retreat was available goes to whether the defendant reasonably believed the force used was necessary to prevent an interference with his or her person. A jury instruction to that effect was proper. State v. Wenger, 225 Wis. 2d 495, 593 N.W.2d 467 (Ct. App. 1999).

When a defendant fails to establish a factual basis to raise self–defense, prior specific acts of violence by the victim have no probative value. The presentation of subjective testimony by an accused, going to a belief that taking steps in self–defense was necessary, is not sufficient for the admission of self–defense evidence. State v. Head, 2000 WI App 275, 240 Wis. 2d 162, 622 N.W.2d 9.

Although intentionally pointing a firearm at another constitutes a violation of s. 941.20, under sub.1) a person is privileged to point a gun at another person in self–defense if the person reasonably believes that the threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference. State v. Watkins, 2002 WI 101, ___ Wis. 2d ___, 647 N.W.2d 244.

A defendant asserting perfect self–defense against a charge of 1st–degree murder must meet an objective threshold showing that he or she reasonably believed that he or she was preventing or terminating an unlawful interference with his or her person and that the force used was necessary to prevent imminent death or great bodily harm. A defendant asserting the defense of unnecessary defensive force s. 940.01 (2) (b) to a charge of 1st–degree murder is not required to satisfy the objective threshold showing. State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413.

A person may employ deadly force against another, if the person reasonably believes that force is necessary to protect a 3rd–person or one's self from imminent death or great bodily harm, without incurring civil liability for injury to the other. Clark v. Ziedonis, 513 F. 2d 79 (1975).

Self–defense—prior acts of the victim. 1974 WLR 266. *State v. Camacho:* The Judicial Creation of an Objective Element to Wisconsin's Law of Imperfect Self–defense Homicide. Leiser. 1995 WLR 742.

939.49 Defense of property and protection against retail theft. **(1)** A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

(2) A person is privileged to defend a 3rd person's property from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend his or her own property from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such as would give the 3rd person the privilege to defend his or her own property, that his or her intervention is necessary for the protection of the 3rd person's property, and that the 3rd person whose property the person is protecting is a member of his or her immediate family or household or a person whose property the person has a legal duty to protect, or is a merchant and the actor is the merchant's employee or agent. An official or adult employee or agent of a library is privileged to defend the property of the library in the manner specified in this subsection.

(3) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

History: 1979 c. 245; 1981 c. 270; 1993 a. 486.

Flight on the part of one suspected of a felony does not, of itself, warrant the use of deadly force by an arresting officer, and it is only in certain aggravated circumstances that a police officer may shoot a fleeing suspect. Clark v. Ziedonis, 368 F. Supp. 544 (1973).

SUBCHAPTER IV
PENALTIES

939.50 Classification of felonies. **(1)** Felonies in the statutes are classified as follows:

(a) Class A felony.
(b) Class B felony.
(c) Class C felony.
(d) Class D felony.
(e) Class E felony.
(f) Class F felony.
(g) Class G felony.
(h) Class H felony.
(i) Class I felony.

(2) A felony is a Class A, B, C, D, E, F, G, H, or I felony when it is so specified in the statutes.

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.
(b) For a Class B felony, imprisonment not to exceed 60 years.
(c) For a Class C felony, a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.
(d) For a Class D felony, a fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both.
(e) For a Class E felony, a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both.
(f) For a Class F felony, a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.
(g) For a Class G felony, a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.
(h) For a Class H felony, a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.
(i) For a Class I felony, a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

NOTE: This section is shown as affected eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads: 939.50 Classification of felonies.

(1) Except as provided in ss. 946.43

(2m) (a), 946.83 and 946.85, felonies in chs. 939 to 951 are classified as follows:

(a) Class A felony.
(b) Class B felony.
(bc) Class BC felony. (c) Class C felony.
(d) Class D felony.
(e) Class E felony.

(2) A felony is a Class A, B, BC, C, D or E felony when it is so specified in chs. 939 to 951. (3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.
(b) For a Class B felony, imprisonment not to exceed 60 years.
(bc) For a Class BC felony, a fine not to exceed $10,000 or imprisonment not to exceed 30 years, or both.
(c) For a Class C felony, a fine not to exceed $10,000 or imprisonment not to exceed 15 years, or both.
(d) For a Class D felony, a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.
(e) For a Class E felony, a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

History: 1977 c. 173; 1981 c. 280; 1987 a. 332 s. 64; 1993 a. 194; 1995 a. 69; 1997 a. 283; 1999 a. 188; 2001 a. 109.

939.51 Classification of misdemeanors. **(1)** Misdemeanors in chs. 939 to 951 are classified as follows:

(a) Class A misdemeanor.
(b) Class B misdemeanor.
(c) Class C misdemeanor.

(2) A misdemeanor is a Class A, B or C misdemeanor when it is so specified in chs. 939 to 951.

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.
(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.
(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

History: 1977 c. 173; 1987 a. 332 s. 64; 1997 a. 35.

939.52 Classification of forfeitures. **(1)** Except as provided in ss. 946.86 and 946.87, forfeitures in chs. 939 to 951 are classified as follows:

(a) Class A forfeiture.
(b) Class B forfeiture.
(c) Class C forfeiture.
(d) Class D forfeiture.
(e) Class E forfeiture.

(2) A forfeiture is a Class A, B, C, D or E forfeiture when it is so specified in chs. 939 to 951.

(3) Penalties for forfeitures are as follows:

(a) For a Class A forfeiture, a forfeiture not to exceed $10,000.
(b) For a Class B forfeiture, a forfeiture not to exceed $1,000.
(c) For a Class C forfeiture, a forfeiture not to exceed $500.
(d) For a Class D forfeiture, a forfeiture not to exceed $200.
(e) For a Class E forfeiture, a forfeiture not to exceed $25.

History: 1977 c. 173; 1981 c. 280; 1987 a. 171; 1987 a. 332 s. 64; 1989 a. 121.

939.60 Felony and misdemeanor defined. A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor.

History: 1977 c. 418 s. 924 (18) (e).

A statutory offense punishable by imprisonment of one year or less in an unspecified place of confinement may result in confinement in a state prison and, therefore, is a felony, regardless of the classification of the offense at the time of the statute's enactment. State ex rel. McDonald v. Douglas County Circuit Ct. 100 Wis. 2d 569, 302 N.W.2d 462 (1981).

939.61 Penalty when none expressed. (1) If a person is convicted of an act or omission prohibited by statute and for which no penalty is expressed, the person shall be subiect to a forfeiture not'to exceed $200.

(2) If a person is convicted of a misdemeanor under state law for which no penalty is expressed, the person may be fined not more than $500 or imprisoned not more than 30 days or both.

(3) Common law penalties are abolished.

History: 1977 c. 173

939.615 Lifetime supervision of serious sex offenders.

(1) DEFINITIONS. In this section:

(a) "Department" means the department of corrections.

(b) "Serious sex offense" means any of the following:

1. A violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2), or (3), 948.02 (1) or (2), 948.025 (1), 948.05 (1) or (1m), 948.055 (l), 948.06, 948.07, 948.075, 948.08, 948.11 (2) (a), 948.12, or 948.13.

2. A violation, or the solicitation, conspiracy or attempt to commit a violation, under eh. 940, 943, 944 or 948 other than a violation specified in subd. 1., if the court determines that one of the purposes for the conduct constituting the violation was for the actor's sexual arousal or gratification.

(2) WHEN LIFETIME SUPERVISION MAY BE ORDERED.

(a) Except as provided in par. (b), if a person is convicted of a serious sex offense or found not guilty of a serious sex offense by reason of mental disease or defect, the court may, in addition to sentencing the person, placing the person on probation or, if applicable, committing the person under s. 971.17, place the person on lifetime supervision by the department if notice concerning lifetime supervision was given to the person under s. 973.125 and if the court determines that lifetime supervision of the person is necessary to protect the public.

(b) A court may not place a person on lifetime supervision under this section if the person was previously placed on lifetime supervision under this section for a prior conviction for a serious sex offense or a prior finding of not guilty of a serious sex offense by reason of mental disease or defect and that previous placement on lifetime supervision has not been terminated under sub.6).

(c) If the prosecutor is seeking lifctime supervision for a person who is charged with committing a serious sex offense specified in sub.1) (b) 2., the court shall direct that the trier of fact find a special verdict as to whether the conduct constituting the offense was for the actor's sexual arousal or gratification.

(3) WHEN LIFETIME SUPERVISION BEGINS. Subject to sub.4), the period of lifetime supervision on which a person is placed under this section shall begin at whichever of the following times is applicable:

(a) If the person is placed on probation for the serious sex offense, upon his or her discharge from probation.

(b) If the person is sentenced to prison for the serious sex offense, upon his or her discharge from parole or extended supervision.

(c) If the person is sentenced to prison for the serious sex offense and is being released from prison because he or she has reached the expiration date of his or her sentence, upon his or her release from prison.

(d) If the person has been committed to the department of health and family services under s. 971.17 for the serious sex offense, upon the termination of his or her Commitment under s. 971.17 (5) or his or her discharge from the commitment under s. 971.17 (6), whichever is applicable

(c) If par. (a), (b), (c) or (d) does not apply, upon the person being sentenced for the serious sex offense.

(4) ONLY ONE PERIOD OF LIFETIME SUPERVISION MAY BE IMPOSED If a person is being sentenced for more than one conviction for a serious sex offense, the court may place the person on one period of lifetime supervision only. A period of lifetime supervision ordered for a person sentenced for more than one conviction begins at whichever of the times specified in sub.3) is the latest.

(5) STATUS OF PERSON PLACED ON LIFETIME SUPERVISION; POWERS AND DUTIES OF DEPARTMENT. (a) A person placed on lifetime supervision under this section is subject to the control of the department under conditions set by the court and regulations established by the department that are necessary to protect the public and promote the rehabilitation of the person placed on lifetime supervision.

(am) The department may temporarily take a person on lifetime supervision into custody if the department has reasonable grounds to believe that the person has violated a condition or regulation of lifetime supervision. Custody under this paragraph may last only as long as is reasonably necessary to investigate whether the person violated a condition or regulation of lifetime supervision and, if warranted, to refer the person to the appropriate prosecuting agency for commencement of prosecution under sub.7).

(b) The department shall charge a fee to a person placed on lifetime supervision to partially reimburse the department for the costs of providing supervision and services. The department shall set varying rates for persons placed on lifetime supervision based on ability to pay and with the goal of receiving at least $1 per day, if appropriate, from each person placed on lifetime supervision. The department may decide not to charge a fee while a person placed on lifetime supervision is exempt as provided under par. (c). The department shall collect moneys for the fees charged under this paragraph and credit those moneys to the appropriation account under s. 20.410 (1) (gh).

(c) The department may decide not to charge a fee under par. (b) to any person placed on lifetime supervision while he or she meets any of the following conditions:

1. Is unemployed.

2. Is pursuing a full--time course of instruction approved by the department.

3. Is undergoing treatment approved by the department and is unable to work.

4. Has a statement from a physician certifying to the department that the person should be excused from working for medical reasons.

(6) PETITION FOR TERMINATION OF LIFETIME SUPERVISION.

(a) Subject to par. (b), a person placed on lifetime supervision under this section may file a petition requesting that lifetime supervision be terminated. A person shall file a petition requesting termination of lifetime supervision with the court that ordered the lifetime supervision.

(b) 1. A person may not file a petition requesting termination of lifetime supervision if he or she has been convicted of a crime that was committed during the period of lifetime supervision.

2. A person may not file a petition requesting termination of lifetime supervision earlier than 15 years after the date on which the period of lifetime supervision began. If a person files a petition requesting termination of lifetime supervision at any time earlier than 15 years after the date on which the period of lifetime supervision began, the court shall deny the petition without a hearing.

(c) Upon receiving a petition requesting termination of lifetime supervision, the court shall send a copy of the petition to the district attorney responsible for prosecuting the serious sex offense that was the basis for the order of lifetime supervision. Upon receiving a copy of a petition sent to him or her under this paragraph, a district attorney shall conduct a criminal history record search to determine whether the person has been convicted of a criminal offense that was committed during the period of lifetime supervision, No later than 30 days after the date on which he or she receives the copy of the petition, the district attorney shall report the results of the criminal history record search to the court and may provide a written response to the petition.

(d) After reviewing the report of the district attorney submitted under par. (c) concerning the results of a criminal history record search, the court shall do whichever of the foliowing is applicable:

1. If the report of the district attorney indicates that the person filing the petition has been convicted of a criminal offense that

was committed during the period of lifetime supervision. the court shall deny the person's petition without a hearing.

2. If the report of the district attorney indicates that the person filing the petition has not been convicted of a criminal offense that was committed during the period of lifetime supervision, the court shall order the person to be examined under par. (e) shall notify the department that it may submit a report under par. (em) and shall schedule a hearing on the petition to be conducted as provided under par. (f).

(e) A person filing a petition requesting termination of lifetime supervision who is entitled to a hearing under par. (d) 2. shall be examined by a person who is either a physician or a psychologist licensed under ch. 455 and who is approved by the court. The physician or psychologist who conducts an examination under this paragraph shall prepare a report of his or her examination that includes his or her opinion of whether the person petitioning for termination of lifetime supervision is a danger to public. The physician or psychologist shall file the report of his or her examination with the court within 60 days after completing the examination. and the court shall provide conies of the renort to the person filing the petition and the district attorney who received a copy o i the person's petition under par. (c). The contents of the report shall be confidential until the physician or psychologist testifies at a hearing under par. (f). The person petitioning for termination of lifetime supervision shall pay the cost of an examination required under this paragraph.

(em) (d) 2., the department may prepare and submit to the court a report concerning a person who has filed a petition requesting termination of lifetime supervision. If the department prepares and submits a report under this paragraph, the report shall include information concerning the person's conduct while on lifetime supervision and an opinion as to whether lifetime supervision of the person is still necessary to protect the public. When a report prepared under this paragraph has been received by the court, the court shall, before the hearing under par. (f), disclose the Contents of the report to the attorney for the person who filed the petition and to the district attorney. When the person who filed the petition is not represented by an attorney, the contents shall be disclosed to the person.

(f) A hearing on a petition requesting termination of lifetime supervision may not be conducted until the person filing the petition has been examined and a report of the examination has been filed as provided under par. (e). At the hearing, the court shall take evidence it considers relevant to determining whether lifetime supervision should be continued because the person who filed the petition is a danger to the public. The person who filed the petition and the district attorney who received the petition under par. (c) may offer evidence relevant to the issue of the person's dangerousness and the continued need for lifetime supervision.

(g) The court may grant a petition requesting termination of lifetime supervision if it determines after a hearing under par (f) that lifetime supervision is no longer necessary to protect the public.

(h) If a petition requesting termination of lifetime supervision is denied after a hearing under par. (f), the person may not file a subsequent petition requesting termination of lifetime supervision until at least 3 years have elapsed since the most recent petition was denied.

(i) If the court grants a petition requesting termination of lifetime supervision and the person is registered with the department under s. 301.45, the court may also order that the person is no longer required to comply with the reporting requirements under s. 301.45. This paragraph does not apply to a person who must continue to comply with the reporting requirements for life under s. 301.45 (5) (b) or for as long as he or she is in this state under s. 301.45 (5m) (b).

(7) PENALTY FOR VIOLATION OF A CONDITION OF LIFETIME SUPERVISION. (a) No person placed on lifetime supervision under this section may knowingly violate a condition or regulation of lifetime supervision established by the court or by the department.

(b) 1. Except as provided in subd. 2., whoever violates par. (a) is guilty of a Class A misdemeanor.

2. Whoever violates par. (a) is guilty of a Class I felony if the same conduct that violates par. (a) also constitutes a crime that is a felonv.

NOTE: Subd. 2. is shown as amended rff. 2–1–03 by 2001 Wis. Act *109.* **Prior to** 2–1–03 **it reads:**

2. Whoever violates par. (a) is guilty of a Class E felony if the same conduct **that violates** par. **(a) also constitutes a crime that is a felony.**

(c) If a person is convicted of violating par. (a) for the same conduct that resulted in the person being convicted of another crime. the sentence imposed for the violation of par (a) shall be consecutive to any sentence imposed for the other crime.

NOTE: Par. (c) is repealed eff. 2–1–03 by 2001 Wis. Act 109.

History: 1997 a. 275; 1999 *a.* 3. 89; 2001 a. 109.

939.62 increased penalty for habitual criminality. (1) If the actor is a repeater, as that term is defined in sub.(2), and the present conviction is for any crime for which imprisonment may be imposed, except for an escape under s. 946.42 or a failure to report under s. 946.425, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) **A** maximum term of imprisonment of one year or less may be increased to not more than 2 years.

NOTE: **Par. (a) is shown as amended eff.** *2–1–03* **by 2001 Wis.** Act *109.* **Prior** to 2–1–03 it **reads:**

(a) A maximum term **of one year or less mar be increased to not more than** 3 **years.**

(b) **A** maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

NOTE: **Par. (b) is shown as amended eff. 2–1–03 by 2001 Wis. Act** 109. **Prior to 2–1–03 if reads:**

(b) A maximum term of more than one year but not more than 10 pears ma? be increased by not more than 2 **years if the prior convictions were for misdemeanors and by not more than 6 years if** the **prior conviction was for a felony.**

(c) **A** maximum term of imprisonment of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

NOTE: Par. (c) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 **it reads:**

(c) A **maximum term of more than 10 years may be increased by not more than 2 years** if **the prior convictions were for misdemeanors and by not more than 10 years** if **the** prior **conviction was for a felony.**

(2) The actor is a repeater if the actor was convicted of a felony during the 5–year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and un-reversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5–year period. time which the actor spent in actual confinement serving a criminal sentence shall he excluded.

(2m) (a) In this subsection:

Im. "Serious child sex offense" means any ofthe following:

a. A violation of s. 948.02, 948.025, 948.05, 948.055, 948.06, 948.07, 948.08 or 948.095 or 948.30 or, if the victim was a minor and the convicted person was not the victim's parent, a violation of s. 940.31

b. **A** crime at any time under federal law or the law of any other state or, prior to July 16, 1998. under the law of this state that is comparable to a crime specified in subd. 1m. a.

2m. "Serious felony" means any ofthc following: a. Any felony under s. 961.41 (l), (1m) or (1x) that is a Class **A,** B, or C felony or, if the felony was committed before February 1, 2003, that is or was punishable by a maximum prison term of 30 years or more.

NOTE: **Subd par. a. is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it rends:**

a. Any felony under s. 961.41 (1), (1m) or (1x) if the felony is punishable bv a maximum prison term of 30 **years or more.**

b. Any Felony under s. 940.09 (1), 1999 stats., s. 943.23 (1m) or (1r), 1999 stats., s. 948.35 (1) (b) or (c), 1999 stats., or s. 948.36, 1999 stats., or s. 940.01, 940.02, 940.03, 940.05, 940.09 (Ic), 940.16, 940.19 (5), 940.195 (5), 940.21, 940.225 (1) or (2), 940.305, 940.31, 941.327 (2) (b) 4., 943.02, 943.10 (2), 943.23 (1g), 943.32 (2), 946.43 (1m), 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c). 948.05, 948.06, 948.07, 948.075, 948.08, or 948.30 (2).

SOTE: Subd par. b. is shown as amended eff. 2–1–03 bv 2001 Wis. Act 109. **Prior to 2–1–03 it reads:**

b. Any felony under s. 940.01, 940.02, 940.03, 940.05, 940.09 (1), 940.16, 940.19 (5), 940.195 (5), 940.21, 940.225 (1) or (2), 940.305, 940.31, 941.327 (2) (b) 4., 943.02, 943.10 (2), 943.23 (1g), (1m), or (1r), 943.32 (2), 946.43 (1m),

948.02 (1) or (2), 948.025, 948.03 2) (a) or (c), 948.05, 948.06, 948.07, 948.075, 918.08, 948.30 2), 948.35 (1) (b) or (c), or 948.36.

c. The solicitation, conspiracy or attempt, under s. 939.30, 939.31 or 939.32, to commit a Class **A** felony.

d. **A** crime at any time under federal law or the law of any other state or, prior to April 28, 1994, under the law of this state that is comparable ton crime specified in *subd.* 2m. a., b. *or* c.

(b) The actor is a persistent repeater if one of the following applies:

1. The actor has been convicted of a serious felony on 2 or more separate occasions at any time pieceding the Serious felony for which he or she presently is being sentenced under ch. 973, which convictions remain of record and un-reversed and, of the 2 or more previous convictions, at least one conviction occurred before the date of violation of at least one of the other felonies for which the actor was previously convicted.

2. The actor has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced under ch. 973, which conviction remains of record and un-reversed.

(bm) For purposes of counting a conviction under par. (b), it is immaterial that the sentence for the previous conviction was stayed, withheld or suspended, or that the actor was pardoned, unless the pardon was granted on the ground of innocence.

(c) If the actor is a persistent repeater, the term of imprisonment for the felony for which the persistent repeater presently is being sentenced under ch. 913 is life imprisonment without the possibility of parole or extended supervision.

(d) If a prior conviction is being considered as being covered under par. (a) 1m. b. or 2m. d. as comparable to a felony specified under par. (a) 1m. a. or 2m. a., b. or c., the conviction may be counted as a prior conviction under par. (b) only if the court determines, beyond a reasonable doubt, that the violation relating to that conviction would constitute a felony specified under par. (a) 1m. a. or 2m. a., b. or c. if committed by an adult in this state.

(3) In this section "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. **341** to 349 and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in otherjurisdictions, the terms do not include those crimes which are equivalent to *motor* vehicle offenses under chs. 341 to 349 or to offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which docs not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

History: 1977 c. 449; 1989 a. 85; 1993 a. 289, 483, 486; 1995 a. 77, 448; 1997 a. 219, 283, 295, 326; 1999 a. 32, 85, 188; 2001 a. 109.

Cross-reference: For procedure, see s. 973.12.

Imposition of a 3-year sentence as a repeater was not cruel and unusual even though the conviction involved the stealing of 2 boxes of candy, which carried a maximum sentence of 6 months. Hanson v. State, 48 Wis. 2d 203, 179 N.W.2d 909 (1970).

A repeater charge must be withheld from the jury's knowledge since it is relevant only to sentencing. Mulkovich v. State, 73 Wis. 2d 464, 243 N.W.2d 198 (1976).

This section authorizes penalty enhancement only when the maximum underlying sentence is imposed. The enhancement portion of a sub-maximum sentence is vacated as an abuse *of* sentencing **discretion.** State v. Harris. 119 Wis. 2d 612, 350 N.W.2d 633 119841.

In sub.2), "convicted of a misdemeanor on 3 separate occasions" requires 3 separate misdemeanors, not 3 separate court appearances. State v. Wittrock, 119 Wis. 2d 664, 350 N.W.2d **M 7** (1984).

A **court's** acceptance of a guilty plea or verdict is sufficient to trigger the operation **of** this **section: completion of** sentencing is **not** a prerequisite. State v. Wimmer, 152 Wis. 2d 654, **419** N.W.2d 621 (Ct. App. 1989).

Felony convictions entered following a waiver from juvenile court are a proper basis for a repealer allegation; those **offenses** were not "handled through" ch 48 State v. Kastner. 156 Wis. 2d 371,457 N.W.2d 331 (Ct. App. 1990).

Sub.1) is applicable when concurrent maximum sentences are imposed for *multiple* offenses. Consecutive sentences are not **required. State** v. Davis. 165 Wis. 2d **78.** 477 N.W.2d 307 (Ct. App. 1991).

For offenses under ch. 161 [now 961], the court may apply s. 961.48 or 939.62, **but** not both. State v. Ray, 166 Wis 2d 855, 481 N.W 2d 288 (Ct. App. 1992)

Each conviction for a misdemeanor constitutes a "separate occasion" for purposes of sub.2). **State.** ■Hopkins, 16R Wis. 2d 802, 484 N.W.2d 549 (1992).

Enhancement **of** a sentence under this section does not violate double jeopardy. State v. **James,** 169 Wis. 2d **190,** 485 N.W.2d 436 (Ct. **App** 1992).

This section does not grant a trial court authority to increase a punitive sanction for contempt of court. State v. Carpenter, 179 Wis. 2d 838, 508 N.W.2d 69 (Ct. App. 1993).

The state is charged with proving a prior conviction and that it lies within the 5-year window of sub.2). State v. Goldstein, 182 Wis. 2d 251, 513 N.W.2d 631 (Ct. App. 1994).

A guilty plea without a specific admission to repeater allegations is not sufficient to establish the facts necessary to impose the repeater penalty enhancer. State v. Zimmermann, 185 Wis. 2d 549, 518 N.W.2d 303 (Ct. App. 1994).

When a defendant does not admit to habitual criminality, the state must prove the alleged repeater status beyond a reasonable doubt. State v. Theriault, 187 Wis. 2d 125, 522 N.W.2d 264 (Ct. App. 1994).

A commitment under the Sex Crimes Law, ch. 975, is not a sentence under sub.2). State v. Kruzycki, 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995).

Sub.2m) (b) is constitutional. It does not violate the guaranty against cruel and unusual punishment, the principal of separation of powers, or the guaranty of equal protection. State v. Lindsey, 203 Wis. 2d 423, 554 N.W.2d 215 (Ct. App. 1996).

A conviction for purposes of sub.2) occurs when the judgment of conviction under s. 972.13 is entered, not the date that guilt is found. Mikrut v. State, 212 Wis. 2d 859, 569 N.W.2d 765 (Ct. App. 1997).

Section 973.13 commands that all sentences in excess of that authorized by law be declared void, including the repeater portion of a sentence. Prior post-conviction motions that failed to challenge the validity of the sentence do not bar seeking relief from faulty repeater sentences. State v. Flowers, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998).

Sub.2m) (b) does not violate constitutional equal protection requirements. State v. Block, 222 Wis. 2d 586, 587 N.W.2d 914 (Ct. App. 1998).

When the state charged the defendant as a repeater under subs.1) (c) and (2), then charged the defendant as a repeater under sub.2m) in the information, it abandoned the earlier charges and could not resurrect them when the latter charge proved to be invalid. State v. Thoms, 228 Wis. 2d 868, 599 N.W.2d 84 (Ct. App. 1999).

Confinement time spent on various parole holds qualifies as actual confinement serving a criminal sentence thereby extending the 5-year period under sub.2). State v. Price, 231 Wis. 2d 229, 231 N.W.2d 229 (Ct. App. 1999).

Jail time served as a condition of probation is time spent in confinement under sub.2) and is excluded from calculating the statute's time period. State v. Crider, 2000 WI App 84, 234 Wis. 2d 195, 610 N.W.2d 198.

Because s. 941.29 (2m), the second offense felon in possession of a firearm statute, defines an additional element to the crime in s. 941.29 (2). felon in possession of a firearm, it creates a separate offense, and not a penalty enhancer, and will support the application of this section. *State v. Gibson, 2000 WI App 207, 238 Wis. 2d 547, 618* N.W.2d 248.

A circuit court may not determine the validity of a prior conviction during an enhanced sentencing proceeding predicated on the prior conviction unless the offender alleges that a violation of the right to a lawyer occurred in the prior conviction. The offender may use whatever means are available to challenge the other conviction in another forum, and if successful, seek to reopen the enhanced sentence. State v. Hahn, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528.

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715.

For purposes of applying this section, the definition of "crime" in s. 939.12 as "conduct which is prohibited by state law and punishable by fine or imprisonment or both" is applicable to statutes outside of chs. 939 to 948 and 951. State v. Sveum, 2002 WI App 105, 254 Wis. 2d 868, 648 N.W.2d 496.

Sub.2m) was constitutional as applied to the defendant. State v. Radke, 2002 WI App 146, ___ Wis. 2d ___, 648 N.W.2d 873.

An uncertified copy of a prior judgment of conviction may be used to prove a convicted defendant's status as a habitual criminal. The rules of evidence do not apply to documents offered during a circuit court's pre-sentence determination of whether a qualifying prior conviction exists. The state has the burden of proof and must offer proof beyond a reasonable doubt of the conviction. State v. Saunders, 2002 WI 107, ___ Wis. 2d ___, 649 N.W.2d 263.

A defendant's admission that an out-of-state crime is a serious felony does not relieve a court of its obligation to make an independent determination on that issue. The trial court's failure to make that finding did not prevent the appellate court from making it. State v. Collins, 2002 WI App 177, ___ Wis. 2d ___, 649 N.W.2d 325.

939.63 Penalties; use of a dangerous weapon. **(1)** If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.

(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.

(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years.

(d) The maximum term of imprisonment for a felony not specified in yar. (b) or (c) may be increased bv not more than 3 years.

(2) The increased penaltyprovidcd in this section docs not apply if possessing, using or threatening *to* use a dangerous weapon is an essential element of the crime charged.

(3) This section applies only *to* crimes specified under chs. 939 to951 and 961.

HOTE: This section is shown as affected by 2001 Wis. Act 109, off 2–1–03. Prior to 2–1–03 it reads:

939.63 Penalties; use of a dangerous weapon. (1)

(a) If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

1. The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.

2. If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.

3. If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years.

4. The maximum term of imprisonment for a felons not specified in subd. 2. or 3. may be increased by not more than 3 years.

(b) The increased penalty provided in this subsection does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged.

(c) This subsection applies only to crimes specified under chr. 939 to 951 and 961.

(2) Whoever is convicted of committing a felony while possessing, using or threatening to use a dangerous weapon shall be sentenced to a minimum term of years in prison, unless the sentencing court otherwise provides. The minimum term for the first application of this subsection is 3 years. The minimum term for any subsequent application of this subsection is 5 years. If the court places the person on probation or imposes a sentence less than the presumptive minimum sentence, it shall place its reasons for so doing on the record.

History: 1979 c. 114; 1981 c. 212; 1987 a. 332 s. 64; 1995 a. 448; 2001 a. 109.

The fact that the maximum term for a misdemeanor may exceed one year under sub.1) (a) 1. does not upgrade the crime to felony status. State v. Denter, 121 Wis. 2d 118, 357 N.W.2d 555 (1984).

Possession encompasses both actual and constructive possession. To prove a violation of this section, the state must prove that the defendant possessed the weapon to facilitate the predicate offense. State v. Peete, 185 Wis. 2d 255, 517 N.W.2d 149 (1994).

See also State v Howard, 211 Wis. 2d 269, 564 N W.2d 753 (1997).

An automobile may constitute a dangerous weapon under s. 93922 (10). State v. Bidwell, 200 Wis. 2d 200, 546 N.W.2d 507 (Ct. App. *1996).*

Under *Peete,* there is sufficient evidence of possession if the evidence allows a reasonable jury to find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it, even if the defendant did not use or threaten to use it in the commission of the crime. State v. Page, *2000* WI App *267,* 240 Wis. 2d 276, 622 N.W 2d *285.*

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, *2002* WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715.

CHAPTER 940
CRIMES AGAINST LIFE AND BODILY SECURITY

SUBCHAPTER II
BODILY SECURITY

Cross Reference: See definitions **ins.** 939.22

NOTE 1987 Wis. Act 399 inciuded changes in homicide and lesser included offenses. Tho sections affected had previously passed the senate as 1987 Senate Bill 191, which was prepared by the Judicial Council and contained explanatory notes. These notes have been inserted following the sections affected and are credited to SB 191 as "Bill 191–S".

940.19 Battery: substantial battery; aggravated battery.

(1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

(2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.

NOTE: Sub. (2) is shown as amended eff. 2–1–03 bv 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class E felony.

(3) Whoever causes substantial bodily harm to another by an act done with intent to cause substantial bodily harm to that person or another is guilty of a Class D felony.

NOTE: Sub. (3) is repealed eff. 2–1-03 by 2001 Wis. Act 109.

(4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.

NOTE Sub. (4) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or mother is guilty of a Class D felony.

(5) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.

NOTE: Sub. (5) is shown as amended eff. 2–1–03 by 2001 Wis. Art 109. Prior to 2–1–03 it reads:

(5) Whoever causes great bodily harm to another by an act done with intent to cause either substantial bodily harm or great bodily harm to that person or mother is guilty of a Class C felony.

(6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:

NOTE Sub. (6) (intro.) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

***(6)* Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class D felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arisen:**

(a) If the person harmed is 62 years of age or older; or (b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.

History: 1977 c. 173: 1979 c. 111, 113; **1987 a.** 399; 1993 **a.** 441, **483; 2001 a.** 109.

Under **the** "elements only" test, **offenses** under subsections **that** require **proof of** non-consent **are not lesser included offenses of offenses under** subsections **for which proof of** non-consent **is not required.** State v. Richards, 123 Wis. 2d 1, 365 N.W.2d 7 (1985).

"Physical **disability" is discussed.** State v. Crowley, **143** Wis. 2d **324, 422** N.W.2d **841 (1988).** First–degree reckless injury, s. **940.23**(1), is **not a** lesser **included** offense **of aggravated battery State** v. Eastman, **185** Wis. 2d **405,** 518 N.W.2d 257 (Ct. **App.** 1994).

The act of throwing urine **that strikes another and causes pain** constitutes a **battery. Sate** v. Higgs, **230** Wis. **2d** 1, 601 N.W.2d **653** (Ct. **App** 1999).

Section 941.20 (1), 1st–degree recklessly endangering **safety, is not a lesser** included **offense of Sub.** (5), **aggravated battery.** State v. **Dibble. 2002** WI App 219. ___Wis. 2d. ___, 650 N.W.2d 908.

940.20 Battery: special circumstances.

(1) BATTERY BY PRISONERS. Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employee, visitor or another inmate of such prison or institution, without his or her consent, is guilty of a Class H felony.

NOTE Sub. (1) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it roads:

(1) BATTERY BY PRISONERS. Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employee, visitor or another inmate of such prison or institution. without his or her consent, is guilty of a Class D felony.

(1m) BATTERY BY PERSONS SUBJECT TO CERTAIN INJUNCTIONS.

(a) Any person who is subject to an injunction under s. 813.12 or a tribal injunction filed under s. 806.247 (3) and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of the petitioner is guilty of a Class I felony.

(b) Any person who is subject to an injunction under s. 813.125 and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of the petitioner is guilty **of** a Class I felony.

NOTE Sub. (1m) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(1m) BATTERY BY PERSONS SUBJECT TO CERTAIN INJUNCTIONS.

(a) Any person who is subject to an injunction under s. 813.12 or a tribal injunction filed under s. 806.247 (3) and who intentionally causes bodily harm to the petitioner who sought the injunction by an art done without the consent of the petitioner is guilty of a Class E felony.

(b) Any person who is subject to an injunction under s. 813.125 and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of the petitioner is guilty of a Class E felony.

(2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), acting in an official capacity and the person knows or has reason to **know** that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class H felony.

NOTE Sub. (2) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act dona without the consent of the person so injured, is guilty of a Class D felony.

(2m) BATTERY TO PROBATION, EXTENDED SUPERVISION AND PAROLE AGENTS AND AFTERCARE AGENTS. (a) In this subsection:

1. "Aftercare agent" means any person authorized by the department of corrections to exercise control over a juvenile on aftercare.

2. "Probation, extended supervision and parole agent" means any person authorized by the department of corrections to exercise control over a probationer, parolee or person on extended supervision.

(b) Whoever intentionally causes bodily harm to a probation, extended supervision and parole agent or an aftercare agent, acting in an official capacity and the person knows or has reason to know that the victim is a probation, extended supervision and parole agent or an aftercare agent, by an act done without the consent of the person so injured, is guilty of a Class H felony.

NOTE: Par. (h) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(b) Whoever intentionally causes bodily harm to a probation, extended supervision and parole agent or an aftercare agent, acting in an official capacity and the person knows or has reason to knew that the victim is a probation, extended supervision and parole agent or an aftercare agent, by an act done without the consent of the person so injured, is guilty of a Class D felony.

(3) BATTERY TO JURORS. Whoever intentionally causes bodily harm to a person who he or she knows or **has** reason to know is or was a grand or petit juror, and by reason of any verdict or

indictment assented to by the person, without the consent of the person injured, is guilty of a Class H felony.

NOTE: Sub. (3) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(3) BATTERY TO JURORS. Whoever intentionally causes bodily harm to a person who he or she knows or has reason to know is or was a grand or petit juror, and by reason of any verdict or indictment assented to by the person, without the consent of the person injured, is guilty of a Class D felony.

(4) BATTERY TO PUBLIC OFFICERS. Whoever intentionally causes bodily harm to a public officer in order to influence the action of such officer or as a result of any action taken within an official capacity, without the consent of the person injured, is guilty of a Class I felony.

NOTE: Sub. (4) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(4) BATTERY TO PUBLIC OFFICERS. Whoever intentionally causes bodily harm to a public officer in order to influence the action of such officer or as a result of any action taken within an official capacity, without the consent of the person injured, is guilty of a Class E felony.

(5) BATTERY TO TECHNICAL COLLEGE DISTRICT OR SCHOOL DISTRICT OFFICERS AND EMPLOYEES.

(a) In this subsection:

1. "School district" has the meaning given in s. 115.01 (3).

2. "Technical college district" means a district established under ch. 38.

(b) Whoever intentionally causes bodily harm to a technical college district or school district officer or employee acting in that capacity, and the person knows or has reason to know that the victim is a technical college district or school district officer or employee, without the consent of the person so injured, is guilty of a Class I felony.

NOTE: Par. (b) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(b) Whoever intentionally causes bodily harm to a technical college district or school district officer or employee acting in that capacity, and the person knows or has reason to know that the victim is a technical college district or school district officer or employee, without the consent of the person so injured, is guilty of a Class E felony.

(6) BATTERY TO PUBLIC TRANSIT VEHICLE OPERATOR, DRIVER OR PASSENGER.

(a) In this subsection, "public transit vehicle" means any vehicle used for providing transportation service to the general public.

(b) Whoever intentionally causes bodily harm to another under any of the following circumstances is guilty of a Class I felony:

NOTE: Par. (b) (intro.) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(b) Whoever intentionally causes bodily harm to another under any of the following circumstances is guilty of a Class E felony:

1. The harm occurs while the victim is an operator, a driver or a passenger of, in or on a public transit vehicle.

2. The harm occurs after the offender forces or directs the victim to leave a public transit vehicle.

3. The harm occurs as the offender prevents, or attempts to prevent, the victim from gaining lawful access to a public transit vehicle.

(7) BATTERY TO EMERGENCY MEDICAL CARE PROVIDERS.

(a) In this subsection:

1e. "Ambulance" has the meaning given in s. 146.50 (1) (am).

1g. "Emergency department" means a room or area in a hospital, as defined in s. 50.33 (2), that is primarily used to provide emergency care, diagnosis or radiological treatment.

2. "Emergency department worker" means any of the following:

a. An employee of a hospital who works in an emergency department.

b. A health care provider, whether or not employed by a hospital, who works in an emergency department.

2g. "Emergency medical technician" has the meaning given in s. 146.50 (1) (e).

2m. "First responder" has the meaning given in s. 146.53 (1) (d).

3. "Health care provider" means any person who is licensed, registered, permitted or certified by the department of health and family services or the department of regulation and licensing to provide health care services in this state.

(b) Whoever intentionally causes bodily harm to an emergency department worker, an emergency medical technician, a first responder or an ambulance driver who is acting in an official capacity and who the person knows or has reason to know is an emergency department worker, an emergency medical technician, a first responder or an ambulance driver, by an act done without the consent of the person so injured, is guilty of a Class H felony.

NOTE: Par. (b) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(b) Whoever intentionally causes bodily harm to an emergency department worker, an emergency medical technician, a first responder or an ambulance driver who is acting in an official capacity and who the person knows or has reason to know is an emergency department worker, an emergency medical technician, a first responder or an ambulance driver, by an act done without the consent of the person so injured, is guilty of a Class D felony.

History: 1977 c. 173; 1979 c. 30, 113, 221; 1981 c. 118 s. 9; 1983 a. 189 s. 329 (4); 1989 a. 336; 1993 a. 54, 164, 491; 1995 a. 27 s. 9126 (19); 1995 a. 77, 145, 225, 343; 1997 a. 35, 143, 283; 1999 a. 85; 2001 a. 109.

Resisting or obstructing an officer, s. 946.41, is not a lesser–included offense of battery to a peace officer. State v. Zdiarstek, 53 Wis. 2d 776, 193 N.W.2d 833 (1972).

A county deputy sheriff was not acting in an official capacity under s. 940.205 [now s. 940.20 (2)] when making arrest outside of his county of employment. State v. Barrett, 96 Wis. 2d 174, 291 N.W.2d 498 (1980).

A prisoner is "confined to a state prison" under Sub. (1) when kept under guard at a hospital for treatment. State v. Cummings, 153 Wis. 2d 603, 451 N.W.2d 463 (Ct. App. 1989).

A defendant's commitment to a mental institution upon a finding of not guilty by reason of mental disease or defect rendered him a "prisoner" under Sub. (1). State v. Skamfer, 176 Wis. 2d 304, N.W.2d (Ct. App. 1993).

940.24 Injury by negligent handling of dangerous weapon, explosives or fire.

(1) Whoever causes bodily harm to another by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class I felony.

NOTE: Sub. (1) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(1) Whoever causes bodily harm to another by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class E felony.

(2) Whoever causes bodily harm to an unborn child by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class I felony.

NOTE: Sub. (2) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) Whoever causes bodily harm to an unborn child by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class E felony.

History: 1977 c. 173; 1987 a. 399; 1997 a. 295; 2001 a. 109.

Judicial Council Note, 1988: The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons other than a firearm, air gun, knife or bow and arrow. See s. 939.22 (10).

The culpable mental state is criminal negligence. See s. 939.25 and the NOTE thereto. [Bill 191–S]

940.30 False imprisonment. Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony.

NOTE: This section is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

940.30 False imprisonment. Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class E felony.

History: 1977 c. 173; 2001 a. 109.

False imprisonment is not a lesser included offense of the crime of kidnapping. Geitner v. State, 59 Wis. 2d 128, 207 N.W.2d 837.

A victim need only take advantage of reasonable means of escape; a victim need not expose himself or herself or others to danger in attempt to escape. State v. C.V.C. 153 Wis. 2d 145, 450 N.W.2d 463 (Ct. App. 1989).

False imprisonment, or confinement, is the intentional, unlawful, and uncontested restraint by one person of the physical liberty of another. State v. Burroughs, 2002 WI App 18, 250 Wis. 2d 180, 640 N.W.2d 190.

940.34 Duty to aid victim or report crime. (1) (a) Whoever violates Sub. (2) (a) is guilty of a Class C misdemeanor.

(b) Whoever violates Sub. (2) (b) is guilty of a Class C misdemeanor and is subject to discipline under s. 440.26 (6).

(c) Whoever violates Sub. (2) (c) is guilty of a Class C misdemeanor.

(2) (a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

(b) Any person licensed as a private detective or granted a private security permit under s. 440.26 who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(c) 1. In this paragraph, "unlicensed private security person" means a private security person, as defined in s. 440.26 (1m) (h), who is exempt from the permit and licensure requirements of s. 440.26.

2. Any unlicensed private security person who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes to others.

3. In the circumstances described under par. (a), assistance is being summoned or provided by others.

4. In the circumstances described under par. (b) or (c), the crime or alleged crime has been reported to an appropriate law enforcement agency by others.

(2m) If a person is subject to Sub. (2) (b) or (c), the person need not comply with Sub. (2) (b) or (c) until after he or she has summonedor provided assistance to a victim.

(3) If a person renders emergency care for a victim, s. 895.48 (1) applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

History: 1983 a. 198; 1985 a. 152,332; 1987 a. 14; 1995 a. 461.

This section is not unconstitutional. For **a conviction,** it must be **proved that** an accused believed a crime was being committed and that a victim was exposed to bodily harm. The reporting required does not require the defendant to incriminate himself or **herself** as the statute contains **no mandate** that **an individual identify** *himself or herself Whether a* **defendant** *fits within* **an** exception under Sub. *(2)*(d) **is** a matter of affirmative defense. **State** v. LaPlante, 186 Wis. 2d 427, 521 N.W.2d 448 (Ct. App. 1994).

CHAPTER 941
CRIMES AGAINST PUBLIC HEALTH AND SAFETY

SUBCHAPTER III
WEAPONS

SUBCHAPTER IV
OTHER DANGEROUS INSTRUMENTALITIES AND PRACTICES

Cross Reference: See definitions in s. 939.22.

941.20 Endangering safety by use of dangerous weapon. **(1)** Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Endangers another's safety by the negligent operation or handling of a dangerous weapon; or

(b) Operates or goes armed with a firearm while he or she is under the influence of an intoxicant; or

(c) Intentionally points a firearm at or toward another.

(d) While on the lands of another discharges a firearm within 100 yards of any building devoted to human occupancy situated on and attached to the lands of another without the express permission of the owner or occupant of the building. "Building" as used in this paragraph includes any house trailer or mobile home but does not include any tent, bus, truck, vehicle or similar portable unit.

(2) Whoever does any of the following is guilty of a Class *G* felony:

NOTE Sub.(2) (intro.) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) Whoever does any of the following is guilty of a Class E felony:

(a) Intentionally discharges a firearm into a vehicle or building under circumstances in which he or she should realize there might he a human being present therein; or

(b) Sets a spring gun.

(3) (a) Whoever intentionally discharges a firearm from a vehicle while on a highway, as defined in s. 340.01 (22), or on a vehicle parking lot that is open to the public under any of the following circumstances is guilty of a Class F felony:

NOTE Par.(a) (intro.) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(1) Whoever intentionally discharges a firearm from a vehicle while on a highway, as defined in s. 340.01 (22), or on a vehicle parking lot that is open to the public under any of the following circumstances is guilty of a Class C felony:

1. The person discharges the firearm at or toward another.

2. The person discharges the firearm at or toward any building or other vehicle.

(b) 1. Paragraph (a) does not apply to any of the following who, in the line of duty, discharges a firearm from a vehicle:

a. A peace officer.

b. A member of the U.S. armed forces.

c. A member of the national guard.

2. Paragraph (a) does not apply to the holder of a permit under s. 29.193 (2) who is hunting from a standing motor vehicle, as defined in s. 29.001 (57), in accordance with s. 29.193 (2) (cr) 2.

(c) The state does not have to negate any exception under par.(b). Any party that claims that an exception under par.(b) is applicable has the burden of proving the exception by a preponderance of the evidence.

(d) The driver of the vehicle may be charged and convicted for a violation of par.(a) according to the criteria under s. 939.05.

(e) A person under par.(a) has a defense of privilege of self–defense or defense of others in accordance with s. 939.48.

History: 1977 c. 173; 1987 a. 399; 1989 a. 131; **1993 a. 94.486;** 1997 **a. 248,249;** 1999 a. 32; 2001 **a.** 109.

Judicial Council Note, 1988: The mental element of the offense under sub.(1) (a) **is changed** from **reckless conduct** to criminal negligence. See **s. 939.25. If the defendant acts recklessly, the conduct is** prohibited **by** s. **941.30.** [Bill 191–S] Pointing **a firearm is** not a lesser included *offense of armed robbery* and **a** defendant **can be convicted** of **both.** State **v.** Smith, 55 Wis. 2d **304, 198** N.W.2d **630** (1972). **A** jury instruction that shooting **"into" a building under** sub.(2) (a) occurs **when a bullet** penetrates **the building however slightly, conformed wiih** common usage **of the word** *and* was not **improper. State** *v. Grady,* **115** Wis. 2d **553, 499** N.W.2d **285** (Ct. **App.** 1993).

Police officers **do** not **have an** absolute **tight to point their weapons,** but privilege **may** be asserted as **an** affirmative defense. Slate v. Trentadue, **180** Wis. 2d **670, 510** N.W.2d **721** (Ct. **App. 1993).**

Although intentionally **pointing a firearm at another** constitutes **a violation** of this **section, under** s. **939.48** (1) a person **is privileged** to **point a gun at another** person **in self–defense** if **the person reasonably believer** that **the** threat **of force** is **necessary** to prevent or **terminate what he** or **she** reasonably **believer to be an** unlawful interference. State v. Watkins, 2002 WI **101,** ___ Wis. 2d ___, 547 N.W.2d 244.

941.23 Carrying concealed weapon. Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of **a** Class **A** misdemeanor.

History: 1977 c. 173; 1979 c. **115, 221.**

The burden **is on** the **defendant to** prove **that he** is **a peace officer** so **as to come within** the **exception. State** v. Willlamon, **58** Wis. 2d **514,206** N.W.2d **613** (1973).

The totality of the circumstances **justified a search for concealed weapons.** Penister v. State, 74 Wis. 2d 94, 246 N.W.2d 115 (1976).

A defendant was properly convicted under this section for driving a vehicle with a gun locked **in** a glove **compartment. State** v. **Fry,** 131 Wis. 2d 153, 388 N.W.2d **565** (1986).

To "go armed" does not **require** going **anywhere. The elements for a** violation of s. 941.23 **are:** 1) a dangerous **weapon** is on **the defendant's person** or **within reach; 2) the defendant is aware of the weapon's presence; and** 3) **the weapon** is hidden. **State** v. **Keith** 175 Wis. 2d **75,498** N.W.2d 865 **(Ct. App.** 1993).

A handgun on **the seat of** a car, indiscernible from ordinary **observation** by a person outside **and within the** immediate vicinity **of the vehicle. was hidden** from view for **purposes of determining whether the** gun was a concealed **weapon under this section. Slate** v. Walls, **190** Wir. 2d **65.526** N.W.2d **765** (Ct. App. 1994).

There is no statutory or common **law** privilege **for the crime of** *carrying* a concealed weapon **under** s. 941.23. **State** Dundon, **226** Wir. 2d **654,594** N.W.2d **780** (1999).

Under the facts of the case, the privilege of of self–defense **was inapplicable to a** charge **of carrying a concealed weapon. State** v. Nollie, **2002** WI **4,249 Wis.** 2d **538. 638** N.W.2d **280.**

Judges are not peace officers authorized to carry concealed **weapons. 69 Atfy. Gen.** 66.

941.235 Carrying firearm in public building. **(1)** Any person who goes armed with a firearm in any building owned or leased by the state or any political subdivision of the state is guilty of a Class **A** misdemeanor.

NOTE: Sub.(1) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(1) Any person who goes armed with a firearm in any building owned or leased by the state or any political subdivision of the state is guilty of a Class B misdemeanor.

(2) This section does not apply to peace officers or armed forces or military personnel who go armed in the line of duty or to any person duly authorized by the chief of police of any city, village or town, the chief of the capitol police or the sheriff of any county to possess a firearm in any building under sub.(1).

History: 1979 c. 221: **1991 a.** 172; **1993** a. 246: **2001 a.** 109.

941.237 Carrying handgun where alcohol beverages may be sold and consumed. (1) In this section:

(a) "Alcohol beverages'' has the meaning given in s. 125.02 (I).

(h) "Correctional officer'' means any person employed by the state or any political subdivision as a guard or officer whose principal duties are the supervision and discipline of inmates.

(c) "Encased has the meaning given in s. 167.31 (1) (b).

(cm) "Firearms dealer" means any person engaged in the business of importing, manufacturing or dealing in firearms and having a license as an importer, manufacturer or dealer issued by the U.S. department of the treasury.

(d) "Handgun" has the meaning given in **s.** 175.35 (1) (b).

(dm) "Hotel" has the meaning given ins. **254.61** (3).

(e) "Premises" has the meaning given in s. **125.02** (14m), but excludes any area primarily used as a residence.

(em) "Private security person" has the meaning given in s. **440.26** (1m) (h).

(9 "Target range" means any area where persons are allowed to use a handgun to fire shots at targets.

(fin) "Tavern" means an establishment, other than a private club or fraternal organization, in which alcohol beverages are sold for consumption on the premises.

(g) "Unloaded means any of the following:

1. Having no shell or cartridge in the chamber of a handgun or in the magazine attached to a handgun.

2. In the case of a caplock muzzle–loading handgun, having the cap removed.

3. In the case of a flintlock muzzle–loading handgun, having the flashpan cleaned of powder.

(2) Whoever intentionally goes armed with a handgun on any premises for which a Class " Bor "Class B license or permit has been issued under ch. 125 is guilty of a Class A misdemeanor.

(3) Subsection (2) does not apply to any of the following:

(a) A peace officer.

(b) A correctional officer while going armed in the line of duty.

(c) A member of the U.S. armed forces or national guard while going armed in the line of duty.

(cm) A private security person meeting all of the following criteria:

1. The private security person is covered by a license or permit issued under s. 440.26.

2. The private security person is going armed in the line of duty.

3. The private security person is acting with the consent of the person specified in par.(d).

(d) The licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.

(ej The possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.

(f) The possession or use of a handgun at a public or private gun or sportsmen's range or club.

(g) The possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B license or permit under ch. 125 for the premises.

(h) The possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.

(i) The possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.

(j) The possession of a handgun in any portion of a combination tavern and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.

(4) The state does not have to negate any exception under sub.(3). Any party that claims that an exception under sub.(3) is applicable has the burden of proving the exception by a preponderance of the evidence.

History: 1993a. 98.491: 1995 a. 461.

Sub.(3) does not allow going armed with a concealed handgun in violation of s. 941.23. State v. Mata, 199 Wis. 2d 315, 544 N.W.2d 578 (Ct. App. 1996).

941.26 Machine **guns** and other weapons; **use** in certain **cases;** penalty. **(1)** (a) No person may sell, possess, use or transport any machine gun or other full automatic firearm.

fb) Except as provided in sub.(4), no person may sell, possess, use or transport any tear gas bomb, hand grenade, projectile or shell or any other container of any kind or character into which tear gas or any similar substance is used or placed for use to cause bodily discomfort, panic, or damage to property.

(1m) No person may take a firearm that is not designed to shoot more than one shot, without manual reloading, by a single function of the trigger and modify the firearm so that it does shoot more than one shot, without manual reloading, by a single function of the trigger.

(2) (a) Any person violating sub.(1) (a) is guilty of a Class H felony.

NOTE Par.(a) is shown as amended eff. 1–1–03 by 2001 Wir. Art 109. Prior to 2–1–03 it reads:

(a) Any person violating Sub.(1) (a) is guilty of a Class E felony.

(b) Any person violating sub.(1m) is guilty of a Class F felony.

NOTE: Par.(b) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(b) Any person violating Sub.(1m) is guilty of a Class C felony.

(c) Except as provided in par.(d), any person who violates sub.(1) (b) regarding the possession, noncommercial transportation or use of the bomb, grenade, projectile, shell or container under sub.(1) (b) is guilty of a Class A misdemeanor.

(d) Any person who violates sub.(1) **(b)** regarding the possession, noncommercial transportation or use of the bomb, grenade, projectile, shell or container under sub.(1) (b) in self–defense or defense of another, as allowed under s. **939.48,** is subject to a Class D forfeiture.

(e) Any person who violates sub.(1) (b) regarding the sale or commercial transportation of the bomb, grenade, projectile, shell or container under sub.(1j (b) is guilty of a Class H felony.

NOTE Par.(e) is shown as amended eff. 1–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(e) Any person who violates Sub.(1) (b) regarding the sale or commercial transportation of the bomb, grenade, projectile, shell or container under Sub.(1) (b) is guilty of a Class E felony.

(f) Any person who violates sub.(1) (b) regarding the use of the bomb, grenade, projectile, shell or container under sub.(1) (b) to cause bodily harm or bodily discomfort to a person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity is guilty of a Class H felony.

NOTE Par.(f) is shown as amended eff. 1–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(f) Any person who violates Sub.(1) (b) regarding the use of the bomb, grenade, projectile, shell or container under Sub.(1) (b) to cause bodily harm or bodily discomfort to a person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity is guilty of a Class D felony.

(g) Any person who violates sub.(1) (bj regarding the use of the bomb, grenade, projectile, shell or container under sub.(1) (bj during his or her commission of another crime to cause bodily harm or bodily discomfort to another or who threatens to use the bomb, grenade, projectile, shell or container during his or her commission of another crime to incapacitate another person is guilty of a Class H felony.

NOTE: Par.(g) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(g) Any person who violates Sub.(1) (h) regarding the use of the bomb, grenade, projectile, shell or container under Sub.(1) fb) during his or her commission of another crime to cause bodily harm or bodily discomfort to another or who threatens to use the bomb, grenade, projectile, shell or container during his or her commission of another crime to incapacitate another person is guilty of a Class E felony.

(3) This section does not apply to the sale, possession, modification, use or transportation of any weapons or containers under sub.(1) or (1m) to or by any armed forces or national guard personnel in the line of duty, any civil enforcement officer of the state or of any city or county. This section does not apply to the sale, possession, modification, use or transportation of weapons under sub.(1) (a) or (1m) to or by any person duly authorized by the chief of police of any city or the sheriff of any county. This section does not apply to the restoration of any weapon under sub.(1) (a) or (1m) by a person having a license to collect firearms as curios or relics issued by the U.S. department of the treasury. The restriction on transportation contained in this section does not apply to common carriers.

(4) (a) Subsections (l) to (3) do not apply to any device or container that contains a combination of oleoresin of capsicum and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort.

(b) Whoever intentionally uses a device or container described under par.(a) to cause bodily harm or bodily discomfort to another is guilty of a Class **A** misdemeanor.

(c) Paragraph (b) does not apply to any of the following:

1. Any person acting in self–defense or defense of another, as allowed under s. **939.48.**

2. Any peace officer acting in his or her official capacity.

3. Any armed forces or national guard personnel acting in the line of duty.

(d) Whoever intentionally uses a device or container described under par.(a) to cause bodily harm or bodily discomfort to **a** person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity is guilty of a Class H felony.

NOTE **Par.(d)** is shown as amended eff. 2–1–03 by *2001* Wis. Act 109. Prior to 2–1–03 it reads:

(d) Whoever intentionally uses a device or container described under par.(a) to cause bodily harm or bodily discomfort to a person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity is guilty of a Class D felony.

(e) Whoever uses a device or container described under par.(a) during his or her commission of another crime to cause bodily harm or bodily discomfort to another or who threatens to use the device or container during his or her commission of another crime to incapacitate another person is guilty of a Class H felony.

NOTE **Par.(e)** is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(e) Whoever uses a device or container described under par.(a) during his or her commission of another crime to cause bodily harm or bodily discomfort to another or who threatens to use the device or container during his or her commission of another crime to incapacitate another person is guilty of a Class E felony.

(f) Any person who offers for sale a device or container described under par.(a) and who leaves in his or her place of business an unsold device or container in a place where customers have ready access to the device or container is subject to a Class C forfeiture.

(g) 1. Any person who sells or distributes a device or container described under par.(a) to a person who has not attained 18 years of age is subject to a Class C forfeiture.

2. A person who proves all of the following by a preponderance of the evidence has a defense to prosecution under subd. 1.:

a. That the purchaser or distributee falsely represented that he or she had attained the age of 18 and presented an identification card.

b. That the appearance of the purchaser or distributee was such that an ordinary and prudent person would believe that the purchaser or distributee had attained the age of 18.

c. That the sale was made in good faith, in reasonable reliance on the identification card and appearance of the purchaser or distributee and in the belief that the purchaser or distributee had attained the age of 18.

(h) Any person who intentionally offers for sale a device or container in a place where customers have direct access to the device or container is guilty of a Class A misdemeanor.

(i) 1. Whoever intentionally sells a device or container described under par.(a) that does not meet the safety criteria provided in rules promulgated under subd. 2. is guilty of a Class A misdemeanor..

2. The department of justice shall promulgate rules providing safety criteria for devices or containers described under par.(a). In promulgating the rules, the department shall do all of the following:

a. Consider recommendations of law enforcement agencies, as defined in s. 165.83 (1) (b), and manufacturers of devices or containers described under par.(a).

b. Provide allowable amounts of oleoresin of capsicum, inert ingredients and total ingredients for a device or container described under par.(a).

c. Provide a maximum effective range for a device or container described under par.(a).

d. Provide other requirements to ensure that a device or container described under par.(a) is effective and appropriate for self–defense purposes.

3. Subdivisions 1. and 2. do not apply to sales of devices or containers described under par.(a) for use by peace officers or armed forces or national guard personnel.

(j) 1. Whoever intentionally sells a device or container described under par.(a) without providing the purchaser with all of the following is guilty of a Class A misdemeanor:

a. A proper label on the device or container.

b. Written safety instructions for using the device or container.

c. A package that contains a clear, highlighted message to the purchaser cautioning him or her to read and follow the safety instructions.

2. The department of justice shall promulgate rules providing the requirements for labeling, packaging and written safety instructions under subd. 1.

(k) Any person who has not attained the age of 18 years and who possesses a device or container described under par.(a) is subject to a Class E forfeiture.

(L) Any person who has been convicted of a felony in this state or has been convicted of a crime elsewhere that would he a felony if committed in this state who possesses a device or container described under par.(a) is subject to a Class A misdemeanor. This paragraph does not apply if the person has received a pardon for the felony or crime.

History: 1977 c. 173; 1987 a. 234; 1991 a. 137; 1993 a. 91; 1995 a. 25; 2001 a. 109.

Cross Reference: See also ch. Jus 14, Wis. adm. code.

941.28 Possession of short–barreled shotgun or short–barreled rifle. **(1)** In this section:

(a) "Rifle" means a firearm designed or redesigned, made or remade, and intended to he fired from the shoulder or hip and designed or redesigned and made or remade to use the energy of a propellant in a metallic cartridge to fire through a rifled barrel a single projectile for each pull of the trigger.

(b) "Short–barreled rifle" means a rifle having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches.

(c) "Short–barreled shotgun" means a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle or a shotgun having an overall length of less than 26 inches.

(d) "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or hip and designed or redesigned and made or remade to use the energy of a propellant in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(2) No person may sell or offer to sell, transport, purchase, possess or go armed with a short–barreled shotgun or short–barreled rifle.

(3) Any person violating this section is guilty of a Class H felony.

NOTE **Sub.(3)** is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(3) Any person violating this section is guilty of a Class E felony.

(4) This section does not apply to the sale, purchase, possession, use or transportation of a short–barreled shotgun or short–barreled rifle to or by any armed forces or national guard personnel in line of duty, any peace officer of the United States or of any political subdivision of the United States or any person who has complied with the licensing and registration requirements under 26 USC 5801 to 5872. This section does not apply to the manufacture of short–barreled shotguns or short–barreled rifles for any person or group authorized to possess these weapons. The restriction on transportation contained in this section does not apply to common carriers. This section shall not apply to any firearm that may be lawfully possessed under federal law, or any firearm that could have been lawfully registered at the time of the enactment of the national firearms act of 1968.

(5) Any firearm seized under this section is subject to s. 968.20 (3) and is presumed to be contraband.

History: 1979 c. 115; 2001 a. 109.

The intent in sub.(1) (d) is that of *the* fabricator; that the gun is incapable of being fired or not intended to be fired by the possessor is immaterial. State v. Johnson, 171 Wis. 2d 175, 491 N.W.2d 110 (Ct. App. 1992).

"Firearm" means a weapon that acts by force of gunpowder to fire a projectile, regardless of whether it is inoperable due to disassembly. State v. Rardon, 185 Wis. 2d 701, 518 N.W.2d 350 (Ct. App. 1994).

941.29 Possession of a firearm. **(1)** A person is subject to the requirements and penalties of this section if he or she has been:

(a) Convicted of a felonv in this state.

(b) Convicted of a crime elsewhere that would be a felony if committed in this state.

(hm) Adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony.

(c) Found not guilty of a felony in this state by reason of mental disease or defect.

(d) Found not guilty of or not responsible for a crime elsewhere that would he a felony in this state by reason of insanity or mental disease, defect or illness.

(e) Committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv).

(f) Enjoined under an injunction issued under s. 813.12 or 813.122 or undera tribal injunction, asdefined in s. 813.12 (1) (e),

issued by a court established by any federally recognized Wisconsin Indian tribe or hand, except the Menominee Indian tribe of Wisconsin, that includes notice to the respondent that he or she is subject to the requirements and penalties under s. **941.29** and that has been filed under s. **806.247** (3).

(g) Ordered not to possess a firearm under s. 813.125 (4m).

(2) A person specified in sub.(1) is guilty of a Class G felony if he or she possesses a firearm under any of the following circumstances:

NOTE Sub.(2) (intro.) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) A person Specified in Sub.(1) is guilty of a Class E felony if he or she possesses a firearm under any of the following circumstances:

(a) The person possesses a firearm subsequent to the conviction for the felony or other crime, as specified in sub.(1) (a) or (b).

(b) The person possesses a firearm subsequent to the adjudication, as specified in sub.(1) (bm).

(c) The person possesses a firearm subsequent to the finding of not guilty or not responsible by reason of insanity or mental disease, defect or illness as specified in sub.(1) (c) or (d).

(d) The person possesses a firearm while subject to the court order, as specified in sub.(1) (e) or (g).

(e) The person possesses a firearm while the injunction, as specified in sub.(1) (f), is in effect.

(2m) Whoever violates this section after being convicted under this section is guilty of a Class D felony.

NOTE Sub.(2m) is repealed eff. 2–1–03 by 2001 Wis. Act 109.

(3) Any firearm involved in an offense under sub.(2) is subject to s. **968.20** (3).

(4) A person is concerned with the commission of a crime, as specified in s. **939.05 (2)** (b), in violation of this section if he or she knowingly furnishes a person with a firearm in violation of sub.(2).

(5) This section does not apply to any person specified in sub.(1) who:

(a) Has received a pardon with respect to the crime or felony specified in sub.(1) and has been expressly authorized to possess a firearm under **18** USC app. **1203;** or

(b) Has obtained relief from disabilities under *18 USC 925* (c).

(6) The prohibition against firearm possession under this section does not apply to any correctional officer employed before May 1, **1982,** who is required to possess a firearm as a condition of employment. This exemption applies if the officer is eligible to possess a firearm under any federal law and applies while the officer is acting in an official capacity.

(7) This section does not apply to any person who has been found not guilty or not responsible by reason of insanity or mental disease, defect or illness if a court subsequently determines both of the following:

(a) The person is no longer insane or no longer has a mental disease, defect or illness.

(b) The person is not likely to act in a manner dangerous to public safety.

(8) This section does not apply to any person specified in sub.(1) (bm) if a court subsequently determines that the person is not likely to act in a manner dangerous to public safetv. In any action or proceeding regarding this determination, the pkrson has the burden of proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.

(9) This section does not apply to a person specified in sub.(1) (e) if the prohibition under s. **51.20** (13) (cv) 1. has been canceled under s. 51.20 (13) (cv) 2. or (16) (gm).

(10) The prohibition against firearm possession under this section does not apply to a person specified in sub.(1) (9 if the person satisfies any of the following:

(a) The person is a peace officer and the person possesses a firearm while in the line of duty or, if required to do so as a condition of employment, while off duty.

(b) The person is a member of the U.S. armed forces or national guard and the person possesses a firearm while in the line of duty.

History: 1981 c. 141, 317: 1983 a. *269;* 1985 **a.** *259;* **1993 a.** 195, **196.491; 1995 a.** 71, 77, 306, 417; **2001 a.** 109.

NOTE See Chapter 141, laws of 1981, section 2, entitled "Initial applicability."

If a **defendant** is willing to stipulate to being a convicted **felon, evidence** of the **nature** of **the felony** is irrelevant if offered only to support **the** felony **conviction element. Sfate** v. McAllister, **153 Wis.** 2d **523,451** N.W.2d **764** (Ct. **App. 1989).**

Failure to give the warning **under** s. **973.033 doer** not **prevent** a conviction **under this section. State** v. Phillips, 172 Wis. 2d 391, 493 N.W.2d 238 (Ct. **App. 1992).**

Retroactive application **of this** provision did **not** violate **the prohibition** against ex post facto laws **because the law** is **intended** not **to punish** persons **for a prior crime** hut **in** protect public **safety.** State v. Thiel, 188 Wis. 2d **695,** 524 N.W.2d **641** (1994).

A convicted felon's possession of a **firearm** is privileged **in limited** enumerated circumstances. **State** v. **Coleman,** 206 Wis. 2d 198, 556 N.W.2d **701** (1996).

Sub.(2m) **is not in the** nature **of** a penalty **enhancer. hut defines** an **additional element** to **the** crime **described in** sub.(2). It **was proper for the** trial **court** to **apply** the general **repeater** statute **to a violator.** State v. Gibson, 2000 WI App 207, 238 Wis. 2d 547, 618 N.W.2d 248.

In this section, to possess means **that** the **defendant** knowingly has control **of a** firearm. **There is no** minimum **length of** time **the** firearm must **be** possessed **for a** violation to **occur.** Intention **in handling** a firearm **is** irrelevant unless **the handling** is privileged **under** s. 939.45. **Sfate** v. **Black** 2001 WI 31, 242 Wis. 2d **126,624** N.W.2d 363.

Sub.(5) (a) has been invalidated by congressional action. Pardons granted after November 15, 1986 will give recipients the right to receive, possess, or transport in commerce firearms unless the pardon expressly provides otherwise. 78 Atty. Gen. 22.

To determine whether a person has been "convicted of a crime elsewhere that would be a felony if committed in this state" under sub.(1) (b), the courts must consider the the underlying conduct of the out–of–state conviction, not merely the statute that was violated. State v. Campbell, 2002 WI App 20, 250 Wis. 2d 238, 642 N.W.2d 230.

941.30 Recklessly endangering safety. (1) FIRST–DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony.

NOTE Sub.(1) in shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 if reads:

(1) FIRST–DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class D felony

(2) SECOND–DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety is guilty of a Class G felony.

NOTE: Sub.(2) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(2) SECOND–DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers mother's safety is guilty of a Class E felony.

History: 1987 a. 399; 2001 **a.** 109.

Judicial Council Note, 1988: Sub.(1) is analogous to the **prior offense** of **endangering safety by conduct regardless** of life. Sub.(2) **is new.** It creates **the** offense **of** endangering safety by **criminal recklessness. See** s. **939.24 and the** NOTE **thereto. [Bill 191–S]** A **bomb scare under** s. **947.015 is** not a **lesser included** crime of recklessly **endangering safely. Sfate** v. Van **Ark,** *62* Wis. 2d 155, 215 N.W.2d **41** (1974).

Section 941.30 **is** a lesser **included** offense **of** s. **940.01,** 1st–degree **homicide. Sfate** v. Weeks, **165** Wis. 2d 200, 477 N.W.2d 642 (Ct. **App.** *1991).*

A conviction under sub.(1) was **proper** when **the** defendant **desisted** from an attack, **hut showed no** regard **for the** victim's **life** or **safety during the** attack. **State** v. Holtz, **173** Wis. 2d **515,496** N.W.2d **668 (Ct App.** 1992).

Cross Reference: See definitions ins. 939.22.

942.06 Use of polygraphs and similar tests. (1) Except as provided in sub. (2m), no person may require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty without the prior written and informed consent of the subject.

(2) Except as provided in sub. (2q), no person may disclose that another person has taken a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty and no person may disclose the results of such a test to any person except the person tested, without the prior written and informed consent of the subject.

(2m) Subsection (1) does not apply to any of the following:

(a) An employee or agent of the department of corrections who conducts a lie detector test of a sex offender under s. 301.132.

(b) An employee or agent of the department of health and family services who conducts a lie detector test of a person under s. 51.375.

(2q) Subsection (2) docs not apply to any of the following:

(a) An employee or agent of the department of corrections who discloses, to any of the following, the fact that a sex offender has had a lie detector test under s. 301.132 or the results of such a lie detector test:

1. Another employee or agent of the department of corrections.

2. Another agency or person, if the information disclosed will be used for purposes related to correctional programming or care and treatment.

(b) An employee or agent of the department of health and family services who discloses, to any of the following, the fact that a person has had a lie detector test under s. 51.375 or the results of such a lie detector test:

1. Another employee or agent of the department of health and family services or another person to whom disclosure is permitted under s. 51.375 (2) (b).

2. Another agency or person, if the information disclosed will be used for purposes related to programming or care and treatment for the person.

(3) Whoever violates this section is guilty of a Class B misdemeanor.

History: 1979 c. 319; 1995 a. 440; 1997a.283; 1999 a. 89; 2001 a. 16.

CHAPTER 943
CRIMES AGAINST PROPERTY

Cross–reference: See definitions in s. **939.22**

943.14 Criminal trespass to dwellings. Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A misdemeanor.

History: 1977 c. 173.

Criminal trespass to **a dwelling is not a** lesser **included offense of burglary.** Raymond v. **State,** 55 Wis. 2d 482, 198 N.W.2d 351 **(1972).**

Regardless of **any ownership tights** in **the** property, if **a** person enters **a dwelling that** is another's **residence,** without consent, this section **is violated. State** v. Carls, 186 Wis. 2d 533, 516 N.W.2d 533 (Ct. App. **1994).**

Entering an outbuilding **accessory to a main** house may **be a violation. 62** Atty. Gen. 16.

943.50 Retail theft.(1) In this section: (a) "Merchant" includes any "merchant" as defined in s. 402.104 (3) or any innkeeper, motelkeeper or hotelkeeper.

(ar) "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant.

(as) "**Theft** detection device remover" means any tool or device used, designed for use or primarily intended for use in removing a theft detection device from merchandise held for resale by a merchant or property of a merchant.

(at) "Theft detection shielding device" means any laminated or coated hag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor.

(b) "Value of merchandise" means: 1. For property of the merchant, the value of the property; or 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

(1m) A person may be penalized as provided in sub.(4) if he or she does any of the following without the merchant's consent and with intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:

(a) Intentionally alters indicia of price or value of merchandise held for resale by a merchant or property of a merchant.

(h) Intentionally takes and carries away merchandise held for resale by a merchant or property of a merchant.

(c) Intentionally transfers merchandise held for resale by a merchant or property of a merchant.

(d) Intentionally conceals merchandise held for resale by a merchant or property of a merchant.

(e) Intentionally retains possession of merchandise held for resale by a merchani or property of a merchant.

(f) While anywhere in the merchant's store, intentionally removes a theft detection device from merchandise held for resale by a merchant or property of a merchant.

(g) Uses, or possesses with intent to use, a theft detection shielding device to shield merchandise held for resale by a merchant or property of merchant from being detected by an electronic or magnetic theft alarm sensor.

(h) Uses, or possesses with intent to use, a theft detection device remover to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.

(3) A merchant, a merchant's adult employee or a merchant's security agent who has reasonable cause for believing that a person has violated this section in his or her presence may detain the person in a reasonable manner for a reasonable length of time to deliver the person to a peace officer, *or* to his or her parent or guardian in the case of a minor. The detained person must be promptly informed of the purpose for the detention and be permitted to make phone calls, hut he or she shall not he interrogated or searched against his or her will before the arrival of a peace officer who may conduct a lawful interrogation of the accused person. The merchant, merchant's adult employee or merchant's security agent may release the detained person before the arrival of a peace officer or parent or guardian. Any merchant, merchant's adult employee or merchant's security agent who acts in good faith in any act authorized under this section is immune from civil or criminal liability for those acts.

(3m) (a) In any action or proceeding for violation of this section, duly identified and authenticated photographs of merchandise which was the subject of the violation may he used **as** evidence in lieu of producing the merchandise.

(b) A merchant or merchant's adult employee is privileged to defend property as prescribed in s. 939.49.

(4) Whoever violates this section is guilty of:

(a) A Class A misdemeanor, if the value of the merchandise does not exceed $2,500.

(bf) A Class I felony, if the value of the merchandise exceeds *62,500* but does not exceed $5,000.

NOTE Par.(bf) is created eff. 2–1–03 by 2001 Wis. Act 109.

(hm) A Class H felony, if the value of the merchandise exceeds $5,000 hut does not exceed $10,000.

NOTE Par.(bm) is created eff. 2–1–03 by 2001 Wir. Act 109.

(c) A Class G felony, if the value of the merchandise exceeds $10,000.

NOTE Par.(c) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(c) *A* Class C felony, if the value of the merchandise exceeds $2,500.

(5) (a) In addition to the other penalties provided for violation of this section, a judge may order a violator to pay restitution under s. ***973.20.***

(h) In actions concerning violations of ordinances in conformity with this section, a judge may order a violator to make restitution under s. 800.093.

(c) If the court orders restitution under pars.(a) and (h), any amount of restitution Daid to the victim under one of those paragraphs reduces the amount the violator must pay in restitution to that victim under the other paragraph.

History: 1977 c. 173; **1981** c. **270; 1983** a. **189** s. 329 **(24); 1985** a. 179; **1987** a. **398; 1991** a 39, 40; **1993** a. **71; 1997** a. 262; **2001** a. 16, 109.

***A* merchant acted reasonably in detaining an innocent** shopper **for 20** minutes **and releasing her without** summoning **police.** Johnson v. K–Mart **Enterprises,** Inc. **98 Wir.** 2d **533, 297** N.W.2d **74 (Ct.** App. 1980).

Sub.(3) requires only **that the merchant's** employee **have** probable cause to believe that the person violated this **section in the** employee's presence, actual theft need not be committed **in the** employee's presence. **Slate** v. **Lee, 157** Wis. 2d **126,458** N.W.2d 562 (Ct. App. 1990).

Reasonableness **under** sub.(3) **requires that: 1) reasonable** cause **to believe that the** person violated this section; 2) the manner of the detention and the actions taken in an attempt to detain must be reasonable; and 3) the length of time of the detention and the actions taken in an attempt to detain must be reasonable. An attempt to detain may include **pursuit,** including **reasonable** pursuit off **the merchant's** premises. **Peters** v. Menard, Inc. **224 Wis.** 2d **174,589** N.W.2d **398 (1999). Shoplining:** protection for **merchant! in** Wisconsin. 57 **MLR** 141

CHAPTER 946
CRIMES AGAINST GOVERNMENT AND ITS ADMINISTRATION

SUBCHAPTER V
OTHER CRIMES AFFECTING THE
ADMINISTRATION OF GOVERNMENT

Cross-reference: See definitions in s. 939.22.

946.69 Falsely assuming to act as a public officer or employee or a utility employee.

(1) In this section, "utility" means any of the following:

(a) A public utility, as defined in s. 196.01 *(5)*.

(b) A municipal power district, as defined in s. 198.01 *(6)*.

(c) A cooperative association organized under ch. 185 to furnish or provide telecommunications service, gas, electricity, power or water.

(2) Whoever does any of the following is guilty of a Class I felony:

NOTE Sub. (2) (intro.) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:

(2) Whoever does any of the following is guilty of a Class E felony:

(a) Assumes to act in an official capacity or to perform an official function, knowing that he or she is not the public officer or public employee or the employee of a utility that he or she assumes to be.

(b) Exercises any function of a public office, knowing that he or she has not qualified so to act or that his or her right so to act has ceased.

History: 1977 c. 173; 1993 a. 146, 486; 1995 a. 225; 1997 a. 27; 2001 a 109.

Sub. (1) is not unconstitutionally vague or overbroad. State v. Wickstrom, 118 Wis. 2d 339, 348 N.W.2d 183 (Ct. App. 1984).

946.70 Impersonating peace officers.

(1) Except as provided in sub. (2), whoever impersonates a peace officer with intent to mislead others into believing that the person is actually a peace officer is guilty of a Class A misdemeanor.

(2) Any person violating sub. (1) with the intent to commit or aid or abet the commission of a crime other than the crime under this section is guilty of a Class H felony.

NOTE: Sub. (2) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:

(2) Any person violating sub. (1) with the intent to commit or aid or abet the commission of a crime other than the crime under this section is guilty of a Class D felony.

History: 1977 c. 173; 1985 a. 97, 332; 2001 a. 109.

Cross-reference: See s. 125.105 for the offense of impersonating an employee of the department of revenue or the department of justice.

CHAPTER 968
COMMENCEMENT OF CRIMINAL PROCEEDINGS

Cross-reference: *See* definitions ins. 967.02.

968.02 Issuance and filing of complaints. **(1)** Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint.

(2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall he issued or the complaint shall be dismissed, pursuant to s. **968.03.** Such filing commences the action.

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

(4) If the alleged violator under s. 948.55 (2) or 948.60 (2) (c) is or was the parent or guardian of a child who is injured or dies as a result of an accidental shooting, the district attorney may consider, among other factors, the impact of the injury or death on the alleged violator when deciding whether to issue a complaint regarding the alleged violation. This subsection does not restrict the factors that a district attorney may consider in deciding whether to issue a complaint regarding any alleged violation.

History: 1977 c. 449; 1991 a. 139 1999 a. 185.

A judge abused his discretion in barring the public from a hearing under sub.(3). State ex rel. Newspapers v. Circuit Court, 124 Wis. 2d 499,370 N.W.2d 209 (1985).

A judge's order under sub.(3) is not appealable. Gavcus v. Maroney, 127 Wis. 2d 69, 377 N.W.2d 201 (Ct. App. 1985).

Sub.(3) does not give a trial court authority to order a district attorney to file different or additional charges than those already brought. Unnamed Petitioner v. Walworth Circuit Ct., 157 Wis. 2d 157,458 N.W.2d 575 (Ct. App. 1990).

Forms similar to the uniform traffic citation that are used as complaints to initiate criminal prosecutions in certain misdemeanor cases are sufficient to confer subject matter jurisdiction on the court but any conviction that results from their use in the manner described in the opinion is null and void; ss. 968.02, 968.04, 971.01, 971.04, 971.05, and 971.08 are discussed. 63 Atty. Gen. 540.

Judicial scrutiny of prosecutorial discretion in decision not to file complaint. Becker, 71 MLR 749 (1988).

968.27 Definitions. In ss. **968.28** to **968.37**: **(1)** "Aggrieved person" means a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed.

(2) "Aural transfer'' means a transfer containing the human voice at any point from the point of origin to the point of reception.

(3) "Contents" when used with respect to any wire, electronic or oral communication, includes any information concerning the substance, purport or meaning of that communication.

(4) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature wholly or partially transmitted hy a wire, radio, electromagnetic, photo-electronic or photo-optical system. "Electronic communication" does not include any of the following:

(a) The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

(b) Any wire or oral communication.

(c) Any communication made through a tone-only paging device.

(d) Any communication from a tracking device

(5) "Electronic communication service" means any service that provides its users with the ability to send or receive wire or electronic communications.

(6) "Electronic communications system" means any wire, radio, electromagnetic, photo-optical or photo-electronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of those communications.

(7) "Electronic; mechanical or other device" means any device or apparatus which can be used to intercept a wire, electronic or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facilities, or any component thereof, which is:

1. Furnished to the subscriber or user by a provider of electronic or wire communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or

2. Being used by a provider of electronic or wire communication service in the ordinary course of its business, or by a law enforcement officer in the ordinary course of his or her duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(8) "Electronic storage" means any of the following:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(b) Any storage of a wire or electronic communication by an electronic communication service for purposes of backup protection of the communication.

(9) "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

(10) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in ss. **968.28** to **968.37,** and any attorney authorized by law to prosecute or participate in the prosecution of those offenses.

(11) "Judge" means the judge sitting at the time an application is made under s. 968.30 or his or her successor.

(12) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. "Oral communication" does not include any electronic communication.

(13) "Pen register'' means a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached. "Pen register" does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(14) "Readily accessible to the general public" means, with respect to a radio communication, that the communication is not any of the following:

(a) Scrambled or encrypted.

(h) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication.

(c) Carried on a sub-carrier or other signal subsidiary to a radio transmission.

(d) Transmitted over a communication system provided by a common carrier, including a commercial mobile radio service provider, as defined in s. 196.01 (2g), unless the communication is a tone–only paging system communication.

(e) Transmitted on frequencies allocated under **47 CFR** part **25,** subpart D, **E** or **F** of part **74,** or part **94,** unless in the case of a communication transmitted on a frequency allocated under **47 CFR** part **74** that is not exclusively allocated to broadcast auxiliary services, the communication is a 2–way voice communication by radio.

(15) "Trap and trace device" means a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(16) "User" means any person who or entity that:

(a) **Uses** an electronic communication service; and (b) Is duly authorized by the provider of the service to engage in that use.

(17) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person engaged as a public utility in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. "Wire communication" includes the electronic storage of any such aural transfer, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

History: 1971 c. 40 5.93; 1987 a. 399; 1991 a. *39;* 1997 a. 218.

The constitutionality of ss. 968.27 to 968.30 **is upheld. State en** rel. Hussong v. Froelich, 62 Wis. 2d 577,215 N.W.2d 390.

An informant **who** is **party** to **a tape** recorded **telephone conversation** also acquired **the conversation in** his mind, regardless **of the use** of tape recorder; that **acquisition is not an "intercept."** The **informant may testify** to **the conversation without** use **of the** recording. **State** v. **Maloney,** 161 Wis. 2d 127,467 N.W.2d 215 **(Ct. App.** 1991).

968.28 Application for court order to intercept communications. The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire, electronic or oral communications. The chief judge may under s. **968.30** grant an order authorizing or approving the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which the application is made. The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances or controlled substance analogs, a computer crime that is a felony under **s. 943.70,** or any conspiracy to commit any of the foregoing offenses.

History: 1971 c. 219; 1977 c. 449; 1983 a. 438: 1987 a. 399; 1995 a. 448.

968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications.

(1) Any investigative or law enforcement officer who, by any means authorized by ss. **968.28** to **968.37** or **18 USC 2510** to **2520,** has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by ss. **968.28** to **968.37** or **18 USC 2510** to **2520,** has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use the contents only to the extent the use is appropnate to the proper performance of the officer's official duties.

(3) (a) Any person who has received, by any means authorized by ss. **968.28** to **968.37** or 18 **USC 2510** to **2520** or by **a** like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. **968.28** to **968.37,** may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(b) In addition to the disclosure provisions of par.(a), any person who has received, in the manner described under s. **968.31 (2)** (b), any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication or that derivative evidence while giving testimony under oath or affirmation in any proceeding described in par.(a) in which a person is accused of any act constituting a felony, and only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording.

(4) No otherwise privileged wire, electronic or oral communication intercepted in accordance with, or in violation of, ss. **968.28** to **968.37** or **18 USC 2510** to **2520,** may lose its privileged character.

(5) When an investigative **or** law enforcement officer, while engaged in intercepting wire, electronic or oral communications in the manner authorized, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and **(2).** The contents and any evidence derived therefrom may be used under sub.(3) when authorized or approved by the judge who acted on the original application where the judge finds on subsequent application, made as soon as practicable but no later than **48** hours, that the contents were otherwise intercepted in accordance with ss. **968.28** to **968.37 or 18 USC 2510 to 2520** or by **a** like statute.

History: 1971 c. 40 ss. 91, 93; 1987 a. 399; 1989 a. 121,359; 1993 a. 98; 1995 a. 30.

Evidence **of intercepted** oral **or wire communications** can be introduced **only if** the **interception was** authorized under s. 968.30; **consent by one** party **to the communication** is not sufficient. **State ex rel.** Arnold v. County Court, 51 Wis. 2d **434,** 187 N.W.2d 354 (1971).

Although **one–party consent tapes** are **lawful, they are not authorized by** ss. 968.28 **to** 968.33 and **therefore the contents cannot be** admitted **as evidence in chief but** s. 968.29 (3) does not prohibit **giving such** taper to the state. **State** v. Waste Management of Wisconsin, Inc. 81 Wis. 2d 555,261 N.W.2d 147 (1977).

Although **a** taped telephone conversation **was obtained without a court order, the defendant opened the** door to **the** tape's **admission by extensive reference** to **the** tape transcript during **his** case–in–chief. **State** v. Albrecht, 184 Wis. 2d 287, 516 N.W.2d 776 (Ct. **App.** 1994).

Sub.(2) authorizes prosecutors **to** include intercepted **communications in** a **criminal** complaint. A prosecutor is a law enforcement officer under sub.(2), and preparation of complaints is within the prosecutor's official duties. State v. Gilmore, 193 Wis. 2d 403, 535 N.W.2d 21 (Ct. App. 1995).

The state may incorporate intercepted communications in a criminal complaint if the complaint is filed under seal. Unilateral public disclosure of such communications in a complaint while not authorized does not subject the **Communication to suppression, but** may entitle the defendant **to remedies** under s. 968.31. **State** v. Gilmore, 201 Win. 2d 820, 549 N.W.2d 401 (1996).

The **state may** use one–party consent recordings **of criminal activity, the** disclosure **of which is not** authorized under sub.(3) (b), **if** the **evidence inadvertently falls within** the "plain heating" of law enforcement officers **Conducting** authorized surveillance. **State** v. Gil, 208 Wis. 2d 531.561 N.W.2d 760 (Ct. App. 1997).

Since interception by government agents of an informant's telephone call was exclusively done by federal agents and was lawful under federal law, Wisconsin law did not govern its admissibility into evidence in a federal prosecution, notwithstanding that the telephone call may have been a privileged communication under Wisconsin law. United States v. Beni, 397 F. Supp. 1086.

968.30 Procedure for interception of wire, electronic or oral communications. (1) Each application for an order authorizing or approving the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation to the court and shall state the applicant's authority to make the application and may be upon personal knowledge or information and belief. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officers authorizing the application.

(b) **A** full and complete statement of the facts and circumstances relied upon by the applicant, to justify the applicant's belief that an order should be issued, including:

1. Details of the particular offense that has been, is being, or is about to be committed;

2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

3. A particular description of the type of communications sought to he intercepted; and

4. The identity of the person, if known, commining the offense and whose communications are to be intercepted.

(c) A full and complete statement whether or not other investigative procedures have been tried and failed or why they reasonably appear to he unlikely to succeed if tried or to be too dangerous.

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications for the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept, or for approval of interceptions of, wire, electronic or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the court on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(3) Upon the application the court may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, electronic or oral communications, if the court determines on the basis of the facts submitted by the applicant that all of the following exist:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 968.28.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) There is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person.

(4) Each order authorizing or approving the interception of any wire, electronic or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities which, or the place where authority to intercept is granted and the means by which such interceptions shall be made;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire, electronic or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. The 30–day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or 10 days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with sub.(1) and the court making the findings required by sub.(3). The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event be for longer than 30 days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall he conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in 30 days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception.

(6) Whenever an order authorizing interception is entered pursuant to ss. 968.28 to 968.33, the order may require reports to be made to the court which issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court requires.

(7) (a) The contents of any wire, electronic or oral communication intercepted by any means authorized by ss. 968.28 to 968.37 shall, if possible, he recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire, electronic or oral communication shall be filed with the court issuing the order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and preserved for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom under s. 968.29 (3).

(b) Applications made and orders granted under ss. 968.28 to 968.33 together with all other papers and records in connection therewith shall be ordered sealed by the court. Custody of the applications, orders and other papers and records shall be wherever the judge shall order. Such applications and orders shall be disclosed only upon a showing of good cause before the judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(c) Any violation of this subsection may be punished as contempt of court.

(d) Within a reasonable time but not later than 90 days after the filing of an application for an order of approval under par.(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application and such other parties to intercepted communications as the judge determines is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application.

2. The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application.'

3. The fact that during the period wire, electronic or oral communications were or were not intercepted.

(e) The judge may, upon the filing of a motion, make available to such person or the person's counsel for inspection in the manner provided in ss. 19.35 and 19.36 such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the issuing judge the serving of the inventory required by this subsection may be postponed. The judge shall review such postponement at the end of 60 days and good cause shall he shown prior to further postponement.

(8) The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This 10–day period may be waived by the judge if he or she finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving the information.

(9) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. The motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware *of* the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of ss. 968.28 to 968.37. The judge may, upon the filing of the motion by the aggrieved person, make available to the aggrieved person or his or her counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest ofjustice.

(b) In addition to any other right to appeal, the state shall have the right to appeal:

1. From an order granting a motion to suppress made under par.(a) if the attorney general or district attorney certifies to the judge or other official granting such motion that the appeal is not entered for purposes of delay and shall he diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court adopts; or

2. From an order denying an application for an order of authorization or approval, and such an appeal shall be ex pane and shall be in camera in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

(10) Nothing in ss. 968.28 to 968.37 shall be construed to allow the interception of any wire, electronic or oral communication between an attorney and a client.

History: 1971 c. 40 s. 93; 1981 c. 335 s. 26; 1987 a. 399; 1993 a. 486.

Although a taped telephone conversation was obtained without a court order, the defendant opened the door to the tape's admission by extensive reference to the tape transcript during his case–in–chief. State v. Albrecht, 184 Wis. 2d 287, 516 N.W.2d 176 *(Ci*App. 1994).

The state may incorporate intercepted communications in a criminal complaint if the complaint is filed under seal. Unilateral public disclosure of such communications in a complaint while not authorized does not subject the communication to suppression, but may entitle the defendant to remedies under s. 968.31. State v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996).

Suppression of wire communications is reserved for those that are illegally intercepted and doer not apply to legally intercepted communications that are improperly disclosed. Stale v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996).

Communications privacy: A legislative perspective. Kastenmeier, Leavy & Beier. 1989 WLR 715 (1989).

968.31 Interception and disclosure of wire, electronic or oral communications prohibited. (1) Except as otherwise specifically provided in ss. 196.63 or 968.28 to 968.30, whoever commits any of the acts enumerated in this section is guilty of a Class H felony:

NOTE Sub. *(1)* (intro.) is shown as amended eff. 2–1–03 by 2001 Wir. Act 109. Prior to 2–1–03 it reads:

(1) Except as otherwise specifically provided in ss. 196.63 or 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than $10,000 or imprisoned for not more than 7 years and 6 *months or* both

(a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire, electronic or oral communication.

(b) lntentionally uses, attempts to use or procures any other person to use or attempt to use any electronic, mechanical or other device to intercept any oral communication.

(c) Discloses, or attempts to disclose, to any other person the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception **of** a wire, electronic or oral communication in violation of this section or under circumstances constituting violation of this section.

(d) Uses, or attempts to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the infonnation was obtained through the interception of a wire, electronic or oral communication in violation of *this* section *or* under circumstances constituting violation of this section.

(e) Intentionally discloses the contents of any oral, electronic or wire communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

(f) Intentionally alters any wire, electronic or oral communication intercepted on tape, wire or other device.

(2) It is not unlawful under ss. 968.28 to 968.37:

(a) For an operator of a switchboard, or an officer, employee or agent of any provider of a wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of a wire or electronic communication service shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) For a person acting under color *of* law to intercept a wire, electronic or oral communication, where the person is a party **to** the communication or one of the parties to the communication **has** given prior consent to the interception.

(c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) For any person to intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public.

(e) For any person to intercept any radio communication that is transmitted:

1. By any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

2. By any governmental, law enforcement, civil defense, private land mobile or public safety communications system, including police and fire, readily accessible to the general public;

3. By a station operating on an authorized frequency within the hands allocated to the amateur, citizens band **or** general mobile radio *services*; or

4. By any marine or aeronautical communications system.

(f) For any person to engage in any conduct that:

1. Is prohibited by section 633 of the communications act of 1934; or

2. Is excepted from the application of section 705 (a) of the communications act of 1934 by section 705 (b) of that act.

(g) For any person to intercept any wire or electronic communication the transmission **of** which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference.

(h) For users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted.

(i) To use a pen register or a trap and trace device as authorized under ss. 968.34 to 968.37; or

(j) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or

completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of the service.

(2m) Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of ss. **968.28** to **968.37** shall have **a** civil cause of action against any person **who** intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication, and shall be entitled to recover from any such person:

(a) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) Punitive damages; and

(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Good faith reliance on a court order or on s. **968.30 (7)** shall constitute **a** complete defense to any civil or criminal action brought under ss. **968.28** to **968.37**.

History: 1971 c. **40** ss. **92, 93; 1977 c. 272; 1985 a. 297: 1987 a.** *399;* **1989 a. 56;** 1991 **a. 294;** 1997 a. **283; 2001 a.** 109.

The **testimony of** an undercover **police** officer rho was carrying a **concealed eavesdropping device under** sub.(2) **is** not **the** product of the **eavesdropping** and is admissible even assuming the eavesdropping was unconstitutional. **Stab** v. Smith, **72** Wis. 2d **711,242** N.W.2d **184 (1976).**

The **use** of **the** "called **parry** control **device"** by the communications common carrier to trace bomb scares **and** other **harassing telephone** calls **would not** violate **any** law if used with **the** consent of the **receiving** party. **60** Atty. Gen. **90.**

Chapter RL 1

PROCEDURES TO REVIEW DENIAL OF AN APPLICATION

RL 1.01 Authority and scope. Rules in this chapter are adopted under authority ins. 440.03 (l), Stats., for the purpose of governing review of a decision to deny an application. Rules in this chapter do not apply to denial of an application for renewal of a credential. Rules in this chapter shall apply to applications received on or after July 1, 1996.

Note: Procedures used for denial of an application for renewal of a credential are found in Ch. RL 2. Wis. Admin. Code and s. 227.01 (3) (b), Stats.

History: Cr. Register, October, 1985, No. 358, eff. 11–1–85; am., Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.02 Scope. History: Cr. Register, October. 1985. No. 358, eff. 11–1–85; r., Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.03 Definitions. In this chapter:

(1) "Applicant" means any person who applies for a credential from the applicable credentialing authority. "Person" in this subsection includes a business entity.

(2) "Credential" means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480, Stats.

(3) "Credentialing authority" means the department or an attached examining board, affiliated credentialing board or board having authority to issue or dcny a credential.

(4) "Denial review proceeding" means a class 1 proceeding as defined ins. 227.01 (3) (a), Stats., in which a crcdentialing authority reviews a decision to deny a completed application for a credential.

(5) "Department" means the department of regulation and licensing.

(6) "Division" means the division of enforcement in the department.

History: Cr. Register, October, 1985, No. 358. eff. 11–1–85: correction in (4) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1988, No. 389 am. (1), (4), r. (2), renum. (3) to be (5), cr. (2), (3), (6), Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.04 Examination failure: retake and hearing. (1) An applicant may request a hearing to challenge the validity, scoring or administration of an examination if the applicant has exhausted other available administrative remedies, including, but not limited to, internal examination review and regrading, and if either:

(a) The applicant is no longer eligible to retake a qualifying examination.

(b) Reexamination is not available within 6 months from the date of the applicant's last examination.

(2) A failing score on an examinalion does not give rise to the right to a hearing if the applicant is eligible to retake the examination and reexamination is available within 6 months from the date of the applicant's last examination

Note: An applicant is not eligible for a license until his or her application is complete. An application is not complete until an applicant has submitted proof of having successfully passed any required qualifying examination. If an applicant fails the qualifying examination, hui has the right to retake it within 6 months, the applicant is not entitled to a hearing under this chapter.

Hirlory: Cr., Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.05 Request for hearing. History: Cr. Register, October, 1985, No. 358, eff. 11–1–85; corrections in (2) (a) and (b) made under s. 13.93(2m) (b) 7., Stats., Register, May, 1988, No. 389; r. Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.05 Notice of intent to deny and notice of denial. (1) NOTICE OF INTENT TO DENY. (a) A. notice of intcnt to deny may be issued upon an initial determination that the applicant does not meet the eligibility requirements for a credential. A notice of intcnt to dcny shall contain a short statement in plain language of the basis for the anticipated denial, specify the stahite, rule or other standard upon which the denial will be based and state that the application shall be denied unless, within 45 calendar days from the date of the mailing of the notice, the credentialing authority receives additional information which shows that the applicant meets the requirements for a credential. The notice shall be substantially in the form shown in Appendix 1.

(b) If the credentialing authority does not receive additional information within the 45 day period, the notice of intent to deny shall operate as a notice of denial and the 45 day period for requesting a hearing described in s. RL 1.07 shall commence on the date of mailing of the notice of intent to deny.

(c) If the credentialing authority receives additional information within the 45 day period which fails to show that the applicant meets the requirements for a credential, a notice of denial shall be issued under sub. (2).

(2) NOTICE OF DENIAL. If the credentialing authority determines that an applicant does not meet the requirements for a credential, the credentialing authority shall issue a notice of denial in the form shown in Appendix 11. The notice shall contain a short statement in plain language of the basis for denial, specify the statute, rule or other standard upon which the denial is based, and be substantially in the form shown in Appendix II.

History: Cr., Register, July, 1996, eff. 8–1–96.

RL 1.06 Parties to a denial review proceeding. Parties to a denial review proceeding are the applicant, the credentialing authority and any person admitted to appear under s. 221.44 (2m), Stats.

History: Cr. Register, October. 1985, No. 358, eff. 11–1–85; renum. from RL 1.04 and am., Register, July, 1996. No. 487, eff. R-1–96.

RL 1.07 Request for hearing. An applicant may request a hearing within 45 calendar days after the mailing of a notice of denial by the credentialing authority. The request shall be in writing and set forth all of the following:

(1) The applicant's name and address.

(2) The type of credential for which the applicant has applied.

(3) A specific description of the mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential. If the applicant asserts that a mistake in fact was made, the request shall include a concise statement of the essential facts which the applicant intends to prove at the hearing. If the applicant asserts a mistake in law was made, the request shall include a statement of the law upon which the applicant relies.

History: Cr., Register, July, 1996, No. 487, off. 8–1–96

RL 1.08 Procedure. The procedures for a denial review proceeding arc:

(1) REVIEW OF REQUEST FOR HEARING. Within 45 calendar days of receipt of a request for hearing, the credentialing authority or its designee shall grant or deny the request for a hearing on a denial of a credential. A request shall be granted ifrequirements in s. RL 1.07 arc met, and the credcntialing authority or its dcsignec shall

notify the applicant of the time, place and nature of the hearing. if the requirements in s. RL 1.07 arc **not** met, a hearing shall be denied. and the crcdcntialing authority or its dcsigncc shall inform the applicant in writing of the reason for denial. For purposes of a petition for review under s. **227.52,** Stats., a request is denied if a rcsponsc to a request for hearing is not issncd within **45** calendar days of its receipt by the credentialing authority.

(2) DESIGNATION OF PRESIDING OFFICER. An administrative law judge employed by the department shall preside over denial hearings, unless the credentialing authority designates otherwise. The administrative law judge shall be an attorney in the department designated by the department general counsel, an employe borrowed froni another agency pursuant to s. **20.901,** Stats., or a person employed as a special project or limited term cmploye by the dcpartmcnt, cxccpt that the administrative law judge may not hc an cmploye in the division.

(3) DISCOVERY. Unless the parties otherwise agree, no discovery is permitted, except for the raking and preservation of evidence as provided in ch. 804, **Stats.,** with respect to witnesses described in s. **227.45 (7)** (a) to (d), Stats. An applicant may inspect records under s. **19.35,** Stats., the public records law.

(4) BURDEN OF PROOF. The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential.

History: Cr., Register, July, 1996, **No. 487. eff. 8–1–96.**

RL 1.09 Conduct of hearing. (1) RECORD. A stenographic, electronic or other record shall be made of all hearings in which the testimony of witnesses is offered as evidence, and of other oral proceedings when requested by a parry

(2) ADJOURNMENTS. The presiding officer may, for good cause, grant continuances, adjournments and extensions of time.

(3) SUBPOENAS. (a) Subpoenas **for** the attendance of any witness at a hearing in the proceeding may be issued in accordance with s. **227.45** (6m), Stats.

(b) A presiding officer may issue protective orders according to the provisions of s. 805.07, Stats.

(4) MOTIONS. **All** motions, except those made at hearing, shall be in writing; filed with the presiding officer and a copy served upon the opposing party not later than 5 days before the time specified for hearing the motion.

(5) EVIDENCE. The credcntialing authority and the applicant shall have the right to appear in person or by counsel, to call, examine and cross–examine witnesses and to introduce evidence into the record. If the applicant submits evidence of eligibility for a credential which was not submitted to the credentialing authority prior to denial of the application, the presiding officer may request the credentialing authority to reconsider the application and the evidence of eligibility not previously considered.

(6) BRIEFS. The presiding officer may require the filing of briefs.

(7) LOCATION OF HEARING. **All** hearings shall be held at the offices of the department in Madison unless the presiding officer determines that the health or safety of a witness or of a party or an emergency requires that a hearing be held elsewhere.

History: Cr., Register, July, 1996, No. 487. eff. at–96.

RL 1.10 Service. Service of any document on an applicant may be made by mail addressed to the applicant at the last address filed in writing by the applicant with the credentialing authority. Service by mail is complete on the date of mailing.

History: Cr. Register, October, 1985, No. 358, eff. 11–1–85; **renum. from RL 1.06 and am., Register, July, 1996, No. 487, eff. 8–1–96.**

RL 1.11 Failure to appear. In the event that neither the applicant nor his or her representative appears at the time and place designated for the hearing, the credentialing authority may take action based upon the record as submitted. By failing to appear, an applicant waives any right to appeal before the credentialing authority which denied the license.

History: Cr. Register, October, 1985, No. 358, eff. 11–1–85; **renum. from RL 1.07 and am., Register, July, 1996, No. 487, eff. 8–1–96.**

RL 1.12 Withdrawal of request. A request for hearing may be withdrawn at any time. Upon receipt of a request for withdrawal, the credentialing authority shall issue an order affirming the withdrawal of a request for hearing on the denial.

History: Cr., Register, July, 1996, No. 487, eff. 8–1–96.

RL 1.13 Transcription fees. (1) The fee charged for a transcript of a proceeding under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.

(b) If a transcript is prepared by the department, the department shall charge a transcription fee of **$1.75** per page and a copying charge of 6.25 per page. If **2** or more persons request a transcript, the department shall charge each requester a copying fee of **S.25** per page, but may divide the transcript fee equitably among the requcstcrs. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee of **S.25** per page.

(2) A person who is without means and who rcqnires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of a petition of indigency signed under oath. For purposes of this section, a determination of indigency shall be hascd on the standards used for making a determination of indigency under s. **977.07,** Stats.

History: Cr., Register, July, 1996, **No. 487, eff.** 8–1–96,

Chapter RL 1

APPENDIX I

NOTICE OF INTENT TO DENY

[DATE]
[NAME and
ADDRESS OF APPLICANT]

Re: Application for [TYPE OF CREDENTIAL]; Notice of Intent to Deny

Dear [APPLICANT]:

PLEASE TAKE NOTICE that the state of Wisconsin [CREDENTIALING AUTHORITY] has reviewed your application for a [TYPE OF CREDENTIAL]. On the basis of the application submitted, the [CREDENTIALING AUTHORITY] intends to deny your application for reasons identified below unless, within 45 calendar days from the date of the mailing of this notice, the [CREDENTIALING AUTHORITY] receives additional infomation which shows that you meet the requirements for a credential.

[STATEMENT OF REASONS FOR DENIAL]

The legal basis for this decision is:

[SPECIFY THE STATUTE, RULE OR OTHER STANDARD UPON
WHICH THE DENIAL WILL BE BASED]

If the [CREDENTIALING AUTHORITY] does not receive additional information within the 45 day period, this notice of intent to deny shall operate as a notice of denial and the 45 day period you have for requesting a hearing shall commence on the date of mailing of this notice of intent to deny.

_____

[Designated Representative of Credentialing Authority]

PLEASE NOTE that you have a right to a hearing on the denial of your application if you file a request for hearing in accordance with the provisions of Ch. RL 1 of the Wisconsin Administrative Code. If you do not submit additional information in support of your application, you may request a hearing within 45 calendar days after the mailing of this notice. Your request must he submitted in writing to the [CKEDENTIALING AUTHORITY] at:

Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708–8935

The request must contain your name and address, the type of credential for which you have applied, a specific description of the mistake in fact or law that you assert was made in the denial of your credential, and a concise statement of the essential facts which you intend to prove at the hearing. You will he notified in writing of the [CREDENTIALING AUTHORITY'S'] decision. Under s. RL 1.08 of the Wisconsin Administrative Code, a request for a hearing is denied if a response to a request for a hearing is not issued with 45 days of its receipt by the [CREDENTIALING AUTHORITY]. Time periods for a petition for review begin to run 45 days after the [CREDENTIALING AUTHORITY] has received a request for a hearing and has not responded.

Chapter RL 1

APPENDIX II

NOTICE OF DENIAL

[DATE]
[NAME and
ADDRESS OF APPLICANT]

Re: Application for [TYPE OF CREDENTIAL]; Notice of Denial

Dear [APPLICANT]:

PLEASE TAKE NOTICE that the state of Wisconsin [CREDENTIALING AUTHORITY] has reviewed your application for a [TYPE OF CREDENTIAL] and denies the application for the following reasons:

[STATEMENT OF REASONS FOR DENIAL]

The legal basis for this decision is:

[SPECIFY THE STATUTE, RULE OR OTHER STANDARD UPON WHICH THE DENIAL WILL BE BASED]

_____

[Designated Representative of Credentialing Authority]

PLEASE NOTE that you have a right to a hearing on the denial of your application if you file a request for hearing in accordance with the provisions of Ch. RL 1 of the Wisconsin Administrative Code. You may request a hearing within 45 calendar days after the mailing of this notice of denial. Your request must he submitted in writing to the [CREDENTIALING AUTHORITY] at:

Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708–8935

The request must contain your name and address, the type of credential for which you have applied, a specific description of the mistake in fact or law that you assert was made in the denial of your credential, and a concise statement of the essential facts which you intend to prove at the hearing. You will be notified in writing of the [CREDENTIALING AUTHORITY'S] decision. Under s. RL 1.08 of the Wisconsin Administrative Code, a request for a hearing is denied if a response to a request for a hearing is not issued within 45 days of its receipt by the [CREDENTIALING AUTHORITY]. Time periods for a petition for review begin to run 45 days after the [CREDENTIALING AUTHORITY] has received a request for a hearing and has not responded.

Chapter RL 2

PROCEDURES FOR PLEADING AND HEARINGS

RL 2.01 Authority. The rules in ch. RL 2 are adopted pursuant to authority in s. 440.03 (1), Stats., and procedures in ch. 227, Stats.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. Register, May, 1982, No. 317, eff. 6–1–82.

RL 2.02 Scope; kinds of proceedings. The rules in this chapter govern procedures in class 2 proceedings, as defined in s. 227.01 (3) (b), Stats., against licensees before the department and all disciplinary authorities attached to the department, except that s. RL 2.17 applies also to class 1 proceedings, as defined in s. 227.01 (3) (a), Stats.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. Register, May, 1982, No. 317, eff. 6–1–82; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1988, No. 389; am. Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.03 Definitions. In this chapter:

(1) "Complainant" means the person who signs a complaint.

(2) "Complaint" means a document which meets the requirements of ss. RL 2.05 and 2.06.

(3) "Department" means the department of regulation and licensing.

(4) "Disciplinary authority" means the department or the attached examining board or board having authority to revoke the license of the holder whose conduct is under investigation.

(5) "Disciplinary proceeding" means a proceeding against one or more licensees in which a disciplinary authority may determine to revoke or suspend a license, to reprimand a licensee, to limit a license, to impose a forfeiture, or to refuse to renew a license because of a violation of law.

(6) "Division" means the division of enforcement in the department.

(7) "Informal complaint" means any written information submitted to the division or any disciplinary authority by any person which requests that a disciplinary proceeding be commenced against a licensee or which alleges facts, which if true, warrant discipline.

(8) "Licensee" means a person, partnership, corporation or association holding any license, permit, certificate or registration granted by a disciplinary authority or having any right to renew a license, permit, certificate or registration granted by a disciplinary authority.

(9) "Respondent" means the person against whom a disciplinary proceeding has been commenced and who is named as respondent in a complaint.

(10) "Settlement conference" means a proceeding before a disciplinary authority or its designee conducted according to s. RL 2.036, in which a conference with one or more licensee is held to attempt to reach a fair disposition of an informal complaint prior to the commencement of a disciplinary proceeding.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. (1) and (6), renum. (7) and (8) to be (8) and (9), cr. (7), Register, May, 1982, No. 317, eff. 6–1–82; r. (1), renum. (2) to (4) to be (1) to (3), cr. (4) and (10), am. (5), (7) and (8), Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.035 Receiving informal complaints. All informal complaints received shall be referred to the division for filing, screening and, if necessary, investigation. Screening shall be done by the disciplinary authority, or, if the disciplinary authority directs, by a disciplinary authority member or the division. In this section, screening is a preliminary review of complaints to determine whether an investigation is necessary. Considerations in screening include, but are not limited to:

(1) Whether the person complained against is licensed;

(2) Whether the violation alleged is a fee dispute;

(3) Whether the matter alleged, if taken as a whole, is trivial; and

(4) Whether the matter alleged is a violation of any statute, rule or standard of practice.

History: Cr. Register, May, 1982, No. 317, eff. 6–1–82; am. (intro.) and (3), Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.036 Procedure for settlement conferences. At the discretion of the disciplinary authority, a settlement conference may be held prior to the commencement of a disciplinary proceeding, pursuant to the following procedures:

(1) SELECTION OF INFORMAL COMPLAINTS. The disciplinary authority or its designee may determine that a settlement conference is appropriate during an investigation of an informal complaint if the information gathered during the investigation presents reasonable grounds to believe that a violation of the laws enforced by the disciplinary authority has occurred. Considerations in making the determination may include, but are not limited to:

(a) Whether the issues arising out of the investigation of the informal complaint are clear, discrete and sufficiently limited to allow for resolution in the informal setting of a settlement conference; and

(b) Whether the facts of the informal complaint are undisputed or clearly ascertainable from the documents received during investigation by the division.

(2) PROCEDURES. When the disciplinary authority or its designee has selected an informal complaint for a possible settlement conference, the licensee shall be contacted by the division to determine whether the licensee desires to participate in a settlement conference. A notice of settlement conference and a description of settlement conference procedures, prepared on forms prescribed by the department, shall be sent to all participants in ad-

vance of any settlement conference. A settlement conferenceshall not *be* held without the consent of the licensee. No agreement reached between the licensee and the disciplinary authority or its designee at a settlement conference which imposes discipline upon the licensee shall be binding until the agreement is reduced to writing, signed by the licensee, and accepted by the disciplinary authority.

(3) ORAL STATEMENTS AT SETTLEMENT CONFERENCE. Oral statements made during a settlement conference shall not be introduced into or made part of the record in a disciplinary proceeding.

History; Cr. Register,June, 1992, No. 438, eff. 7–1–92.

RL 2.037 Parties to a disciplinary proceeding. Parties to a disciplinary proceeding are the respondent, the division and the disciplinary authority before which the disciplinary proceeding is heard.

History: Cr. Register, May, 1982, No. 317. eff. 6-1–82; renum. from RL 2.036 and am., **Register,** June, 1992, *No.* 438, eff. 7–1–92.

RL 2.04 Commencement of disciplinary proceedings. Disciplinary proceedings are commenced when a notice of hearing is filed in the disciplinary authority office or with a designated administrative law judge.

History: Cr. Register, February, 1979, No. 278. eff. 3–1–79: am. Register, June, 1992, No. 438, **eff.** 7-1-92.

RL 2.05 Pleadings to *be* captioned. All pleadings, notices, orders, and other papers filed in disciplinary proceedings shall becaptioned "BEFORE THE _____" and shall beentitled "IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST _____, RESPONDENT."

History: Cr. Register, October, 1978, No. 274. eff. 11–1–78.

RL 2.06 Complaint. A complaint may he made on information and belief and shall contain:

(1) The name and address of the licensee complained against and the name and address of the complainant:

(2) A short statement in plain language of the cause for disciplinary action identifying with reasonable particularity the transaction, occurrence or event out of which thecansearises and specifying the statute, rule or other standard alleged to have been violated;

(3) A request in essentially the following form: "Wherefore, the complainant demands that the disciplinary authority hear evidence relevant to matters alleged in this complaint, determine and impose the discipline warranted, and assess the costs of the proceeding against the respondent:" and.

(4) The signature of the complainant.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. (intro.), (3) and (4), Register, June. 1992, No. 438, eff. 7–1–92.

RL 2.07 Notice *of* hearing. (1) A notice ofhearing shall be sent to the respondent at least 10 days prior to the hearing, unless for good cause such notice is impossible or impractical, in which case shorternoticemay be given, but in no case may the notice be provided less than 48 hours in advance of the hearing.

(2) A notice ofhearing to the respondent shall be substantially in the form shown in Appendix I and signed by a disciplinary authority member or an attorney in the division.

History: Cr Register. October, 1978, No. 274. eff. 11–1–78; am. (2) (intro.), Register, February, 1979, No. 278, eff. 3–1–79; r. and recr. Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.08 Service and filing of complaint, notice of hearing and other papers. (1) The complaint, notice of hearing, all orders and other papers required to he served on a respondent may be served by rnailirig a copy of the paper to the respondent at the last known address of the respondent or by any procedure described in s. 801.14 (2), Stats. Service by mail is complete upon mailing.

(2) Any paper required to be filed with a disciplinary authority may be mailed to the disciplinary authority office or, if an administrative law judge has been designated to preside in the matter, to the administrative law judge and shall be deemed filed on receipt at the disciplinary authority office or by the administrative law judge. An answer under s. RL 2.09, and motions under s. RL 2.15 may be filed and served by facsimile transmission. A document filed by facsimile transmission under this section shall also be mailed to the disciplinary authority. An answer or motion filed by facsimile transmission shall be deemed filed on the first business day after receipt by the disciplinary authority.

History: Cr Register, October, 1978, No. 274, eff. 11–1–78; am. (2), Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.09 Answer. (1) An answer to a complaint shall state in short and plain terms the defenses to each cause asserted and shall admit or deny the allegations upon which the complainant relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. The respondent shall make denials as specific denials of designated allegations or paragraphs but if the respondent intends in good faith to deny only a part or a qualification of an allegation, the respondent shall specify so much of it as true and material and shall deny only the remainder.

(2) The respondent shall set forth affirmatively in the answer any matter constituting an affirmative defense.

(3) Allegations in a complaint are admitted when not denied in the answer.

(4) An answer to a complaint shall be filed within 20 days from the date of service of the complaint.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. (4), Register, February, 1979, No. 278, eff. 3–1–79; am. (1), (3) and (4), Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.10 Administrative law judge. (7) DESIGNATION. Disciplinary hearings shall be presided over by an administrative law judge employed by the department unless the disciplinary authority designates otherwise. The administrative law judge shall be an attorney in the department designated by the department general counsel, an employe borrowed from another agency pursuant to s. 20.901, Stats., or a person employed as a special project or limited term employe by the department; except that the administrative law judge may not be an employe in the division.

(2) AUTHORITY. An administrative law judge designated under this section to preside over any disciplinaryproceedinghas the authority described in s. 227.46 (l), Stats. Unless otherwise directed by a disciplinary authority pursuant to s. 227.46 (3), Stats., an administrative lawjudge presiding over a disciplinary proceeding shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case.

(3) SERVICE OF PROPOSED DECISION. Unless otherwise directed by a disciplinary authority, the proposed decision shall be served by the administrative lawjudge on all parties with a notice providing each party adversely affected by the proposed decision with an opportunity to file with the disciplinary authority objections and written argument with respect *to* the objections. A party adversely affected by a proposed decision shall have at least 10 days from the date of service of the proposed decision to file objections and argument.

History: Cr. Register, October, 1978,No. 274, eff. 11–1–78; r. and recr. (1), Register, November, 1986, No. 371, eff. 12–1–86; correction in *(2)* made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1988, No. 389; am. Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.11 Prehearing conference. In any matter pending before the disciplinary authority the complainant and the respondent, or their attorneys, may be directed by the disciplinary authority or administrative law judge to appear at a conference or to participate in a telephone conference to consider the simplifica-

tion of issues, the necessity or desirability of amendments to the pleadings, the admission of facts or documents which will avoid unnecessary proof and such other matters as may aid in the disposition of the matter.

History: Cr. Register. October, 1978, No. 274, eff. 11–1–78; am. Register, **June,** 1992, No. 438, cff. 1992.

RL 2.12 **Settlements.** No stipulation or settlement agreement disposing of a complaint or informal complaint shall be effectivc or binding in any respect until reduced to writing, signed by the respondent and approved by the disciplinary authority

History: Cr. Register, **October.** 1978, No. 274, eff. 11–1–78; am. Register, June, 1992, No. 438, cff. 7 1 -92.

RL 2.13 **Discovery.** The person prosecuting the complaint and the respondent may, prior to the date set for hearing. obtain discovery by use of the methods described in ch. 804, Stats., for the purposes set forth therein. Protective orders, including orders to terminate or limit examinations, orders compelling discovery, sanctions provided in s. 804.12, Stats. or other remedies as are appropriate for failure to comply with such orders may be made by the presiding officer.

History: **Cr.** Register, October, 1978, No. **274,** eff. 11–1–78.

RL 2.14 **Default.** If the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinarv authorirv enters an order or within a reasonable time thcrcafter.

History: Cr. **Register,** October, 1978, No. 274, eff. 11–1–78; **am.** *Register, June,* 1992, No. **438,** eff. 7–1–92.

RL 2.15 **Conduct of hearing. (1)** PRESIDING OFFICER. The hearing shall be presided over by a member of the disciplinary authority or an administrative law judge designated pursuant to s. RL2.10.

(2) RECORD. A stenographic, electronic or other record shall be made of all hearings in which the testimony of witnesses is offered as evidence.

(3) EVIDENCE. The complainant and the respondent shall have the right to appear in person or by counsel, to call, examine, and cross–examine witnesses and to introduce evidence into the record.

(4) BRIEFS. The presiding officer may require the filing of briefs.

(5) MOTIONS. **All** motions. except those made at hearing, shall be in writing, filed with the presiding officer and a copy served upon the opposing party not later than 5 days before the time specificd for hearing the motion.

(6) **ADJOURNMENTS.** The presiding officer may, for good cause, grant continuances, adjournments and extensions of time.

(7) SUBPOENAS. (a) Subpoenas for the attendance of any witness at a hearing in the proceeding may be issued in accordance with s. 885.01. Stats. Service shall be made in the manner provided in **s.** 805.07(5), Slats. **A** subpoena may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

(b) **A** presiding officer may issue protective orders according to the provision the provisions of s. 805.07, Stats.

(8) LOCATION **OF** HEARING. **All** hearings shall be held at the offices of the department of regulation and licensing in Madison unless the presiding officer determines that the health or safety of a witness or of a party or an emesgency requires that a hearing be held elsewhere.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. (1), (5) and (6), cr. (8), Register, June, 1992, No. 438, eff. 7–1–92.

RL 2.16 **Witness fees and costs.** Witnesses subpoenaed at the request of the division or the disciplinary authority shall be entitled to compensafion from the state forattendanceand travel as provided in ch. 885, Stats

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; am. Register, June, 1992, No. 438, cff. 5–1–92.

RL 2.17 **Transcription fees. (1)** The fee charged for a transcript of a proceeding under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.

(h) If a transcript is prepared by the department, the department shall charge a transcription fee of $1.75 per page and a copying charge of ***S.25*** per page. **If 2** or more persons request a transcript, the department shall charge each requester a copying fee of S.25 per page, hut may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request **is** made, the department shall assume the transcription fee, hut shall charge a copying fee of S.25 per page.

(2) A person who is without means and who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript Without charge upon the filing of a petition of indigency signed under oath.

History: Cr. Register, **October,** 1978, No. **274,** eff. 11–1–78; am. (1) Register, May, 1982, No. 317, cff. 6–1–82; r. and recr. Register, June, 1992, No. 438, cff. 7–1–92; am. (1) (b), **Register,** August, 1993. No. 452, **eff.** 9–1 -93.

RL 2.18 Assessment of costs. (1) The proposed decision of an administrative law judge following hearing shall include a recommendation whether all or part of the costs of the proceeding shall be assessed against the respondent.

(2) I f a respondent objects to the recommendation of an administrative law judge that costs be assessed, objections to the assessment of costs shall be filed. along with any other objections to the proposed decision, within the time established for filing of objections.

(3) The disciplinary authority's final decision and order imposing discipline in a disciplinary proceeding shall include a determination whether all or part of the costs of the proceeding shall be assessed against the respondent

(4) When costs are imposed, the division and the administrative law judge shall file supporting affidavits showing costs incurred within 15 days of the date of the final decision and order. The rcspondciit shall file any objection to the affidavits within 30 days of the date of the final decision and order. The disciplinary authority shall review any objections, along with the affidavits, and affirm or modify its order without a hearing.

History: Cr. Register, June, 1992. No. 438, eff. 7–1–92.

Chapter RL 2
APPENDIX I
NOTICE OF HEARING

THE STATE OF WISCONSIN

To each person named above as **a** respondent:

You are hereby notified that disciplinary proceedings have been commenced against you before the (#1). The Complaint, which is attached to this Notice, states the nature and basis of the proceeding. This proceeding may result in disciplinary action taken against you by the (#2). This proceeding is a class 2 proceeding as defined in s. 227.01 (3) (h), Wis. Stats.

Within 20 days from the date of service of the complaint, you must respond with a written Answer to the allegations of the Complaint. You may have an attorney help or represent you. The Answer shall follow the general rules of pleading contained in s. RL 2.09. If you do not provide a proper Answer within 20 days, you will he found to he in default, and **a** default judgment may he entered against you on the bais of the complaint and other evidence and the (#3) may take disciplinary action against you and impose **the** costs of the investigation, prosecution and decision of this matter upon **you** without further notice or hearing.

The original of your Answer should he filed with the Administrative Law Judge who has been designated to preside over this matter pursuant to s. RL 2.10, who is:

(#4)
Department of Regulation and Licensing
Office of Board Legal Services
P. O. Box 8935
Madison, Wisconsin 53708

You should also file a copy of your Answer with the complainant's attorney, who is:

(#5)
Department of Regulation and Licensing
Division of Enforcement
P. **O. Box** 8935
Madison, Wisconsin 53708

A hearing on the matters contained in the Complaint will be held at the time and location indicated below:

Hearing Date, Time and Location

Date: (#6)
Time: (#7)
Location: Room(#8)
1400 East Washington Ave
Madison, Wisconsin

or as soon thereafter as the matter may he heard. The questions *to* be determined at this hearing are whether the license previously issued to you should he revoked or suspended, whether such license should be limited, whether you should be reprimanded, whether, if authorized hy law, **a** forfeiture should he imposed, or whether any other discipline should be imposed on you. You may be represented by an attorney at the hearing. The legal authority and procedures under which the hearing is to he held is set forth in s. 227.44, Stats., s. (#9), Stats., ch. RL 2, and s. (#10).

If you do not appear for hearing at the time and location set forth above, you will he found to he in default, and a default judgment may he entered against you on the basis of the complaint and other evidence and the (#11) may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing.

If you choose to **be** represented by an attorney in this proceeding, the attorney is requested to file **a** Notice of Appearance with the disciplinary authority and the Administrative Law Judge within 20 days of your receiving this Notice

Dated at Madison, Wisconsin this _____day of, _____20__ .

_____
Signature of Licensing Authority Member or Attorney
(#12)

INSERTIONS

1. Disciplinary authority
2. Disciplinary authority
3. Disciplinary authority
4. Administrative Law Judge
5. Complainant's attorney
6. Date of hearing
7. Time ***of*** hearing
8. Location ofhearing
9. Legal authority (statute)
10. Legal authority (administrative code)
11. Disciplinary authority
12. Address and telephone number of person signing the complaint

Chapter RL 3

ADMINISTRATIVE INJUNCTIONS

RL 3.01 Authority. The rnles inch. RL 3 are adopted pursuant to authority in ss. 440.03 (1) and 440.21, Stats.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.02 Scope; kinds of proceedings. The rules in this chapter govern procedures in public hearings before the department to determine and make findings as to whether a person has engaged in a practice or used a title without a credential required under chs. 440 to 459, Stats., and for issuance of an administrative injunction.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.03 Definitions. In this chapter:

(1) "Administrative injunction" means a special order enjoining a person from the continuation of a practice or use of a title without a credential required under chs. 440 to 459, Stats.

(2) "Credential" means a license, perniit, or certificate of certification or registration that is issued under chs. 440 to 459, Stats.

(3) "Department" means the department of regulation and licensing.

(4) "Division" means the division of enforcement in the department.

(5) "Petition" means a document which meets the requirements of s. RL 3.05.

(6) "Respondent" means the person against whom an administrative injunction proceeding has been commenced and who is named as respondent in a petition.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.04 Pleadings to be captioned. All pleadings, notices, orders, and other papers filed in an administrative injunction proceeding shall be captioned: "BEFORE THE DEPARTMENT OF REGULATION AND LICENSING" and shall be entitled: "IN THE MATTER OF A PETITION FOR AN ADMINISTRATIVE INJUNCTION INVOLVING _____, RESPONDENT."

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.05 Petition for administrative injunction. A petition for an administrative injunction shall allege that a person has engaged in a practice or used a title without a credential required under chs. 440 to 459, Stats. A petition may be made on information and belief and shall contain:

(1) The name and address of the respondent and the name and address of the attorney in the division who is prosecuting the petition for the division;

(2) A short statement in plain language of the basis for the division's belief that the respondent has engaged in a practice or used a title without a credential required under chs. 440 to 459, Stats., and specifying the statute or rule alleged to have been violated;

(3) A request in essentially the following form: "Whercforc, the division demands that a public hearing be held and that the department issue a special order enjoining the person from the continuation of the practice or use of the title;" and,

(4) The signature of an attorney authorized by the division to sign the petition.

History: Cr. Register. July, 1993, No. 451, eff. 8–1–93.

RL 3.06 Notice of hearing. (1) A notice of hearing shall be sent to the respondent by the division at least 10 days prior to the hearing, except in the case of an emergency in which shorter notice may be given, but in no case may the notice be provided less than 48 hours in advance of the hearing.

(2) A notice of hearing to the respondent shall be essentially in the form shown in Appendix I and signed by an attorney in the division.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93

RL 3.07 Service and filing of petition, notice of hearing and other papers. (1) The petition, notice of hearing, all orders and other papers required to be served on a respondent may he served by mailing a copy of the paper to the respondent at the last known address of the respondent or by any procedure described in s. 801.14 (2), Stats. Service by mail is complete upon mailing.

(2) Any paper required to be filed with the department may be mailed to the administrative law judge designated to preside in the matter and shall be deemed filed on receipt by the administrative law judge. An answer under s. RL 3.08, and motions under s. RL 3.14 may bc filed and served by facsimile transmission. A document filed by facsimile transmission under this section shall also be mailed to the department. An answer or motion filed by facsimile transmission shall be deemed filed on the first business day after receipt by the department.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.08 Answer. (1) An answer to a petition shall state in short and plain terms the defenses to each allegation asserted and shall admit or deny the allegations upon which the division relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. The respondent shall make denials as specific denials of designated allegations or paragraphs but if the respondent intends in good faith to deny only a part or to provide a qualification of an allegation, the respondent shall specify so much of it as true and material and shall deny only the remainder.

(2) The respondent shall set forth affirmatively in the answer any matter constituting an affirmative defense.

(3) Allegations in a petition are admitted when not denied in the answer.

(4) An answer to a petition shall be filed within 20 days from the date of service of the petition.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.09 Administrative law judge. (1) DESIGNATION. Administrative injunction proceedings shall he presided over by an administrative law judge. The administrative law judge shall be an attorney in the department designated by the department general counsel, an cinploye borrowed from another agency pursuant to s. 20.901, Stats., or a person employedasaspecialproject or limited term employe by the department. The administrative law judgc may not be an employe in the division

(2) AUTHORITY. **An** administrative law judgc designated under this section has the authority described in s. 227.46 (l); Stats. Unless otherwise directed under s. 227.46 (3), Stats., an administrative law judge shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted by the depaitment as the final decision in the case.

(3) SERVICE OF PROPOSED DECISION. The proposed decision shell be served by the administrative law judge on all parties with a notice providing each party adversely affected by the proposed decision with an opportunity to file with the department objections and written argument with respect to the objections. **A** party adversely affcctcd by a proposed decision shall have at least 10 days from the date of service of the proposed decision to file objections and argument.

History: Cr. Register, **July,** 1993, No. 451, eff. **8–1–93.**

RL 3.10 Prehearing conference. In any matter pending before the department, the division **and** the respondent may be directed by the administrative law judgc to appear at a conference ortoparticipate in a telephoneconference toconsiderthe simplification of issues, the necessity or desirability of amendments to the pleading, the admission of facts or documents which will avoid unnecessary proof and such other matters as may aid in the disposition of the matter.

History: Cr. Register, **July,** 1993, No. 451, **eff. 8-1-93.**

RL 3.11 Settlements. No stipulation or settlement agreement disposing ofapetition or informal petition shall be effective or binding in any respect until reduced to writing, signed by the respondent and approved by the department

History: Cr. Register, **July, 1993,** No. 451, eff. **&I–93.**

RL 3.12 Discovery. The division and *the* respondent may, prior to the date set for hearing; obtain discovery by use of the methods described in ch. 804, Stats., for the purposes set forth therein. Protective orders, including orders to terminate or limit examinations, orders compelling discovery, sanctions provided in s. 804.12, Stats., or other remedies as are appropriate for failure to comply with such orders may be made by the administrative law judge.

History: Cr. Register, **July, 1993,** No. 451, eff. 8–1–93.

RL 3.13 Default. If the respondent fails to answer as required by s. KL 3.08 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the department may make findings and enter an order on the basis of the petition and other evidence. The department may, for good cause, relieve the respondent From the effect of the findings and permit the respondent to answer and defend at any time before the department enters an order or within a reasonable time thereafter.

History: Cr. Register, July, 1993, No. 451, eff. 8–1–93.

RL 3.14 Conduct of hearing. (1) ADMINISTRATIVE LAW JUDGE. The hearing shall bc presided over by an administrative law judge designated pursuant to **s.** KL 3.09.

(2) RECORD. A stenographic. electronic or other record shall be made of all hearings in which the testimony of witnesses is offercd as evidence.

(3) EVIDENCE. The division and the respondent shall have the right to appear in person or by counsel, to call, examine, and cross–examine witnesses and to introduce evidence into the record.

(4) BRIEFS. The administrative law judge may require the filing of briefs.

(5) MOTIONS. (a) ***How made.*** An application to the administrative law judge for an order shall hc by motion which, unless made during a hearing or prehearing conference, shall he in writing, state with particularity the grounds for the order, and set forth the relief or order sought.

(h) *Filing.* Amotion shall be filed with the administrative law judge and a copy served upon the opposing party not later than 5 days before the time specified for hearing the motion.

(c) *Supporting papers.* Any briefs or other papers in support of a motion, including affidavits and documentary cvidcnce, shall be filed with the motion.

(6) ADJOURNMENTS. The administrative law judge may, for good cause, grant continuances, adjournments and extensions of time.

(7) SUBPOENAS. (a) Subpoenas for the attendance of any witness at a hearing in the proceeding may be issued in accordance with s. 885.01, Stats. Service shall he made in the manner provided in s. 805.07 *(5),* Stats. Asubnoenamavcommandthenerson to whom it is directed to produce the books; papers, documents, or tangible things designated therein.

(b) **An** administrative law judge may issue protective orders according to the provisions of s. 805.07, Stats.

(8) LOCATION OF HEARING. All hearings shall be held at the offices of the department in Madison unless the administrative law judge determines that the health or safety of a witnessorofapariy or an emergency requires that a hearing be held elsewhere.

History: Cr. Register, **July,** 1993, No. 451, **eff.** 8–1–93.

RL 3.15 Witness fees and costs. Witnesses subpoenaed at the request of the division shall be entitled to compensation from the state for attendance andtravel as provided inch. 885, Stats.

History: Cr. Register, **July,** 1993, No. 451, eff. 8–1–93.

RL 3.16 Transcription fees. (1) The fee charged for a transcript of a proceeding under this chapter shall he computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.

Note: The Slate Operational Purchasing **Bulletin may be** obtained from the Department of Administration, State Bureau of Procurement, 101 E. Wilson Street, 6th **Floor,** P.O. **Box** *7867.* Madison, Wisconsin 53707–7867.

(b) If a transcript ispreparedhy thedepartment, the department shall charge a transcription fee of $1.75 per page and a copying charge of S.25 per page. If 2 or more persons request a transcript, the department shall charge each requester a copying fee of S.25 per page, hut may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee ofS.25 per page.

(2) A person who is without means **and** who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of an affidavit showing that the person is indigent according to the standards adopted in rules of the state public defender under ch. 977, Stats.

History: Cr. Register, **July,** 1993, **No.** 451, **eff. &I–93.**

Chapter RL 3

APPENDIX I

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULAITON AND LICENSING

IN THE MATTER OF A PETITION FOR AN ADMINISTRATIVE, INJUNCTION INVOLVING

NOTICE OF HEARING

(#1),
Respondent

NOTICE OF HEARING

TO: (#2)

You are hereby notified that a proceeding for an administrative injunction has been commenced against you by the Department of Regulation and Licensing. The petition attached to this Notice states the nature and basis of the proceeding. This proceeding may result in a special order against you under s. 440.21, Stats., enjoining you from the continuation of a practice or use of a title.

A HEARING ON THE MATTERS CONTAINED IN THE PETITION WILL BE HELD A T

Date: (#3) Time: (#4)
Location: Room (#5),
1400 East Washington Avenue
Madison, Wisconsin

or as soon thereafter as **the** matter **may be** heard.
The questions to be determined at this hearing are whether (#6).

Within 20 days from the date of service of the Notice, you must respond with a written Answer to the allegations of the Petition. You may have an attorney help or represent you. Your Answer must follow the rules of pleading in s. RL 3.08 of the Wisconsin Administrative Code. **File** your Answer with the Administrative Law Judge for this matter who is:

(#7), Department of Regulation and Licensing, Office **of** Board Legal Services,
P.O. **Box 8935,**
Madison. Wisconsin 53708

Please file a copy of your answer with the division's attorney, who is:

(#8), Division of Enforcement,
Department of Regulation and Licensing,
P.O. **Box 8935,**
Madison, Wisconsin **53708**

If you do not provide a proper Answer within 20 days or do not appear for the hearing, you will he found to be in default and a special order may he entered against you enjoining you from the continuation of **a** practice or use of a title. If **a** special order is issued as **a** result of this proceeding and thereafter you violate the special order, you may be required to forfeit not more than $10,000 for each offense

You may he represented by **an** attorney at the hearing. This proceeding is **a** class **2** proceeding as defined in s. 227.01 (3) (b), Stats. If you choose to be represented by an attorney in this proceeding, the attorney **is** requested to file **a** Notice of Appearance with the Administrative Law Judge and the division within 20 days after you receive this Notice.

The legal authority and procedures under which the hearing is to be held are set forth in ss. 227.21, 440.44, (#9), Stats., and ch. RL **3,** Wis. Admin. Code.

Dated at Madison, Wisconsin this _____ day of 20

(...#10...), Attorney

INSERTIONS
1. Respnndent
2. Respondent with address
3. Date ofhearing
4. Time ofhearing
5. Place ofhearing
6. Issues for hearing
7. Administrative Law Judge
8. Division of Enforcement attorney
9. Legal authority (statute)
10. Division of Enforcement attorney

Chapter RL 4

DEPARTMENT 'LICATION PROCEDURES AND ,TION FEE POLICIES

RL 4.01 Authorization. The following rules are adopted by the department of regulation and licensing pursuant to ss. 440.05, 440.06 and **440.07,** Stats.

History: Cr. **Register,** October, *1978,* No. **274.** eff. *11–1–78;* **am. *Register, July,* 1996, No. 487, eff. 8–1–96.**

RL 4.02 Definitions. (1) "Applicant" means a person who applies for a license, permit, certificate or registration granted by the department or a board.

(2) "Authority" means the department or the attached examining board or board having authority to grant the credential for which an application has been filed.

(3) "Board" means the board of nursing and any examining board attached to the department.

(4) "Department" means the department of regulation and licensing.

(5) "Examination" means the written and practical tests required of an applicant by the authority.

(6) "Service provider" means a party other than the department or hoard who provides examination services such as application processing, examination products or administration of examinations.

History: Cr. Register, October, **1978, Nu. 274,** eff. **11–1–78: renum. (1) to** (4) **to be** (4), (3). **(1), (5) and am. (5), cr. (2) and (6), Register, duly. 1996, No. 487, eff. 8–1–96.**

RL 4.03 Time for review and determination of credential applications. (1) TIME LIMITS. An authority shall review and make a determination on an original application for a credential within 60 business days after a completed application is received by the authority unless a different period for review and determination is specified hy law.

(2) COMPLETED APPLICATIONS. An application is completed when all materials necessary to make a determination on the application and all materials requested hy the authority have been received by the authority.

(3) EFFECT OF DELAY. **A** delay hy an authority in making a determination on an application within the time period specified in this section shall be reported to the permit information center under s. **227.**116, Stats. Delay by an authority in making a determination on an application within the time period specified in this section docs not relieve any person from the obligation to secure approval from the authority nor affect in any way the authority's responsibility to interpret requirements for approval and to grant or deny approval.

History: Cr. Register, **August,** 1992, No. 440, eff. **9–1–92; renum. *from*** RL **4.06 and am., Register, July, 1996, No. 487, eff. 8–1–96.**

RL 4.04 Fees for examinations, reexaminations and proctoring examinations. (1) EXAMINATION FEE SCHEDULE. A list of all current examination fees may be obtained at no charge from the Office of Examinations, Dcpartmcnt of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, **WI 53708.**

(3) EXPLANATION OF PROCEDURES FOR SETTING EXAMINATION FEES. (a) Fees for examinations shall be established under s. 440.05 (1) (b), Stats., at the department's best estimate of the actual cost of preparing, administering and grading the examination or obtaining and administering an approved examination from a service provider.

(b) Examinations shall be obtained from a service provider through competitive procurement procedures described in ch. Adm 7.

(c) Fees for examination services provided by the deparhnent shall be established based on an estimate of the actual cost of the examination services. Computation of fees for examination services provided by the department shall include standard component amounts for contract administration services, test development services and written and practical test administration services.

(d) Examination fees shall **be** changed as needed to reflect changes in the actual costs to the department. Changes to fees shall be implemented according to par. (e).

(e) Examination fees shall be effective for examinations held **45** days or more after the date ofpublication of a notice in application forms. Applicants who have submitted fees in an amount less than that **in** the most current application form shall pay the correct amount prior to administration of the examination. Overpayments shall be refunded by the department. Initial credential fees shall become effective on the date specified by law.

(4) REEXAMINATION OF PREVIOUSLY LICENSED INDIVIDUALS. Fees for examinations ordered as part of a disciplinary proceeding or late renewal under s. **440.08 (3)** (b), Stats., are equal to the fee set for reexamination in the most recent examination application form, plus $10 application processing.

(5) PROCTORING EXAMINATIONS FOR OTHER STATES. (a) Examinations administered by an authority of the state may be proctored for persons applying for credentials in another state if the person has been determined eligible in the other state and meets this state's application deadlines. Examinations not administered by an authority of the state may only be proctored for Wisconsin residents or licensees applying for credentials in another state.

(b) Department fees for proctoring examinations of persons who are applying ***for*** a credential in another state are equal ***to*** the cost of administering the examination to those persons, plus any additional cost charged to the department by the service provider.

History: Cr. Register, October, 1978, No. 274, eff. 11–1–78; r. and recr. Register, May, 1986, No. 365, eff. 6–1–86; am. Register, December, 1986, No. 372, eff. 1–1–87; am. Register, September, 1987, No. 381, eff. 10–1–87; am. (3), Register, September, 1988, No. 393, eff. 10–1–88; am. (3), Register, September, 1990, No. 417, eff. 10–1–90; r. and recr. (1) to (3), cr. (4), renum. Figure and am. Register, April, 1992, No. 436, eff. 5–1–92; am. (4) Figure, cr. (5), Register, July, 1993, No. 451, eff. 8–1–93; r. and recr. Register, November, 1993, No. 455, eff. 12–1–93; **r. (2), am. (3) (a), (b), (c), (e), (4), (5), Register, July, 1996, No. 487, eff. 8–1–96.**

RL 4.05 Fee for test review. (1) The fee for supervised review of examination results by a failing applicant which is conducted by the department is **$28.**

(2) The fee for review of examination results by a service provider is the fee established by the service provider.

History: Cr. Register, April, **1992, No. 436.** eff. **5–1–92; am. Register, July, 1996,** No. **487, eff. 8–1–96.**

RL 4.06 Refunds. (1) A refund of all hut $10 of the applicant's examination fee and initial credential fee submitted to the department shall he granted if any of the following occurs:

(a) An applicant is found to be unqualified for an examination administered by the authority.

(b) An applicant is found to be unqualified for a credential for which no examination is required.

(c) An applicant withdraws an application by written notice to the authority at least 10 days in advance of any schcdulcd examination.

(d) An applicant who fails to take an examination administered by the authority either provides written notice at least 10 days in advance of the examination date that the applicant is unable to take the examination, or if written notice was not provided, submits a written explanation satisfactory to the authority that the applicant's failure to take the examination resulted from extreme personal hardship.

(2) An applicant eligible for a refund may forfeit the refund and choose instead to take an examination administered by the authority within 18 months of the originally scheduled examination at no added fee.

(3) An applicant who misses an examination as a result of being called to active military duty shall receive a full refund. The applicant requesting the refund shall supply a copy of the call up orders or a letter from the commanding officer attesting to the call up.

(4) Applicants who pay fees to service providers other than the department are subject *to* the refund policy established by the Service provider

History: Cr. Register, October, 1978, No. 274, eff. i 1–1–78; am. (2) (intro.), Register, May, 1986, No. 365, eff. 6 1 -86; am. (1) and (2) (intro.), renum. (2) (c) and (3) to be (3) and (4), cr. (5), Register, September, 1987, No. 381, eff. 10–1–87; r. and recr. (1) and (4), Register, April, 1992, No. 436, eff. 5–1–92; r. (2), renum. (3) to (5) to he (2) to (4), Register, July, 1993, No. 451, eff. 8–1–93; renum. from RL 4.03 and am., Register, July, 1996, No. 487, eff. 8–1–96.

Chapter RL 6

SUMMARY SUSPENSIONS

RL 6.01 **Authority and intent.** (1) This chapter is adopted pursuant to authority in ss. 227.11 (2) (a) and 440.03 (1), Stats., and intcrprcts s. 227.51 (3), Stats.

(2) The intent of the department in creating this chapter is to specify uniform procedures for summary suspension of licenses, permits, certificates or registrations issued by the department or any board attached to the department in circumstances where the public health, safety or welfare imperatively requires emergency action.

History: Cr. Register, May, 1988, No. 389, eff. 6-1-88.

RL 6.02 **Scope.** This chapter governs procedures in all summary suspension proceedings against licensees before the department or any board attached to the department. To the extent that this chapter is not in conflict with s. 448.02 (4), Stats.. the chapter shall also apply in proceedings brought under that section.

History: Cr. Register, May, 1988, No. 389, eff. 6-1-88

RL 6.03 **Definitions.** In this chapter:

(1) "Board" means the bingo control board, real estate board or any examining board attached to the department.

(2) "Department" means the department of regulation and licensing.

(3) "Disciplinary proceeding" means a proceeding against one or more licensees in which a licensing authority may determine to revoke or suspend a license, to reprimand a licensee, or to limit a license.

(4) "License" means any licensc, permit, certificate, or registration granted by a board or the department or a right to renew a license, permit, certificate or registration granted by a board or the department.

(5) "Licensee" means a person, partnership, corporation or association holding any license.

(6) "Licensing authority" means the bingo control board, real estate board or any examining board attached to the department, the department for licenses granted by the depamnent, or one acting under a board's or the department's delegation under s. RL 6.11.

(7) "Petitioner" means the division of cnforccmcnt in the department.

(8) "Respondent" means a licensee who is named as respondent in a petition for summary suspension.

History: Cr. Register, May, 1988, No. 389, eff. 6-1-88.

RL 6.04 **Petition for summary suspension.** (1) A petition for a summary suspension shall state the name and position of the person representing the petitioner, the address of the petitioner, the name and licensure status of the respondent, and an assertion of the facts establishing that the respondent has engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license.

(2) A petition for a summary suspension order shall be signed upon oath by the person representing the petitioner and may be made on information and belief.

(3) The petition shall be presented to the appropriate licensing authority.

History: Cr. Register, May. 1988, No. 389, eff. 6-1-88.

RL 6.05 **Notice of petition to respondent.** Prior to the presenting of the pctition, the petitioner shall give notice to the respondent or respondent's attorney of the time and place when the petition will be presented to the licensing authority. Notice may be given by mailing a copy of the petition and notice to the last-known address of the respondent as indicated in the records of the licensing authority as provided in s. 440.11 (2), Stats. as created by 1987 Wis. Act 27. Notice by mail is complete upon mailing. Notice may also bc given by any procedure described in s. 801.11, Stats.

History Cr. Register, May. 1988, No. 389, eff. 6-1-88.

RL 6.06 **Issuance of summary suspension order.** (1) If the licensing authority finds that notice has been given under s. RL 6.05 and finds probable cause tn believe that the respondent has engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license, the licensing authority may issue an order for summary suspension. The order may be issued at any time prior to or subsequent to the commencement of a disciplinary proceeding under s. RL 2.04.

(2) The petitioner may establish probable cause under sub. (1) by affidavit or other evidence.

(3) The summary suspension order shall be effective upon service under s. RL 6.08, or upon actual notice of the summary suspension order to the respondent or respondent's attorney, whichever is sooner, and continue through the effective date of the final decision and order made in the disciplinary proceeding against the respondent, unless the license is restored under s. RL 6.09 prior to a formal disciplinary hearing.

History: Cr. Register, May, 1988, No. 389, eff. 6-1-88

RL 6.07 **Contents of summary suspension order.** The summary suspension order shall include the following:

(1) A statement that the suspension order is in effect and continues until the effective date of a final order and decision in the disciplinary proceeding against the respondent, unless otherwise ordered by the licensing authority;

(2) Notification of the respondent's right to request a hearing to show cause why the summary suspension order should not be continued;

(3) The name and address of the licensing authority with whom a request for hearing should be filed;

(4) Notification that the hearing to show cause shall be scheduled for hearing on a date within 20 days of receipt by the licensing authority of respondcnt's request for hearing, unless a later time is requested by or agreed to by the respondent;

(5) The identification of all witnesses providing evidence at the time the petition for summary suspension was presented and identification of the evidence used as a basis for the decision to issue the summary suspension order;

(6) The manner in which the respondent or the respondent's attorney was notified of the petition for summary suspension: and

(7) A finding that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license.

History: Cr. Register, May, 1988, No. 389, eff. **61–88.**

RL 6.08 Service of summary suspension order. An order of summary suspension shall **be** served upon the respondent in the manner provided in s. 801.11, Stats.. for service of summons.

History: Cr. Register, May, 1988, No. 389, eff. **61–88**

RL 6.09 Hearing to show cause. (1) The respondent shall have the right to request a hearing to show cause why the summary suspension order should not be continued until the effective date of the final decision and order in the disciplinary action against the respondent.

(2) The request for hearing to show cause shall be filed with the licensing authority which issued the summary suspension order. The hearing shall be scheduled and heard promptly by the licensing authority but no later than 20 days afier the filing of the request for hearing with the licensing authority, unless a later time is requested by or agreed to by the licensee

(3) At the hearing to show cause the petitioner and the respondent may testify, call, examine and cross–examine witnesses, and offer other evidence.

(4) At the hearing to show cause the petitioner has the burden to show by a preponderance of the evidence why the summary suspension order should be continued.

(5) At the conclusion of the hearing to show cause the licensing authority shall make findings and an order. If it is determined that the summary suspension order should not be continued, the suspended license shall be immediately restored.

History: Cr. Register, May, 1988, No. 389, eff. 6–1–88.

RL 6.10 Commencement of disciplinary proceeding. (1) A notice of hearing commencing a disciplinary proceeding under s. RL 2.06 against the respondent shall be issued no later than 10 days following the issuance of the summary suspension order or the suspension shall lapse on the tenth day following issuance of the summary suspension order. The formal disciplinary proceeding shall he determined promptly.

(2) If at any time the disciplinary proceeding is not advancing with reasonable promptness, the respondent may make a motion to the hearing officer or may directly petition the appropriate board, or the department, for an order granting relief.

(3) If it is found that the disciplinary proceeding is not advancing with reasonable promptness. and the delay is not as a result of the conduct of respondent or respondent's counsel, a remedy, as would be just, shall he granted including:

(a) An order immediately terminating the summary suspension; or

(b) An order compelling that the disciplinary proceeding he held and detcrmincd by a specific date.

History: Cr. Register, May, 1988, No. 389, eff. **6-1–18.**

RL 6.11 Delegation. (1) A board may hy a two–thirds vote:

(a) Designate under s. 227.46 (1), Stats., amembcrofthcboard or an employe of the department to rule on a petition for summary suspension, to issue a summary suspension order, and to preside over and rule in a hearing provided for in s. RL 6.09; or

(b) Appoint a panel of no less than two–thirds of the membership ofthe hoard to rule on a petition for summary **suspension,** to issue a summary suspension order, and to preside over and rule in a hearing provided for in s. RL 6.09.

(2) In matters in which the department is the licensing authority, the department secretary or the secretary's designee shall rule on a petition for summary suspension, issue a summary suspension order, and preside over and rule in a hearing provided for in s. RL 6.09.

(3) Except as provided in s. 227.46 (3), Stats., a delegation of authority under subs. (1) and (2) may be continuing.

History: Cr. Register, May, 1988, No. 389, eff. 6–1–88.

Chapter RL 7

IMPAIRED PROFESSIONALS PROCEDURE

RL 7.01 Authority and intent. (1) The mles in this chapter are adopted pursuant to authority in ss. 15.08 (5) (b), 51.30, 146.82, 227.11 and 440.03, Stats.

(2) The intent of the department in adopting rules in this chapter is to protect the public from credential holders who are impaired by reason of their abuse of alcohol or other drugs. This goal will be advanced by providing an option to the formal disciplinary process for qualified credential holders committed to their own recovery. This procedure is intended to apply when allegations are made that a credential holder has practiced a profession while impaired by alcohol or other drugs or when a credential holder contacts the department and requests to participate in the procedure. It is not intended to apply in situations where allegations exist that a credential holder has committed violations of law, other than practice while impaired hy alcohol or other dmgs. which are substantial. The procedure may then be utilized in selected cases to promote early identification of chemically dependent professionals and encourage their rehabilitation. Finally, the department's procedure does not seek to diminish the prosecution of serious violations but rather it attempts to address the problem of alcohol and other dmg abuse within the enforcement jurisdiction of the department.

(3) In administering this program, the department intends to encourage board members to share professional expertise so that all boards in the department have access to a range of professional expertise to handle problems involving impaired professionals.

History: Cr. Register, January, 1991. No. 421, eff. 2-1-91; am. (2), Register, July. 1996, No. 487. eff. 8-1-96.

RL 7.02 Definitions. In this chapter:

(1) "Board" means any examining board or affiliated credentialing hoard attached to the department and the real estate hoard.

(2) "Board liaison" means the hoard member designated by the board as rcsponsihle for approving credential holders for the impaired professionals procedure under s. RL 7.03, for monitoring compliance with the requirements for participation under s. RL 7.04, and for performing other responsibilities delegated to the board liaison under these rules.

(2a) "Coordinator" means a department employee who coordinates the impaired professionals proccdure.

(2b) "Credential holder" means a person holding any license, permit, certificate or registration granted by the department or any hoard.

(3) "Department" means the department of regulation and licensing.

(4) "Division" means the division of enforcement in the department.

(5) "Informal complaint" means any written information submitted by any person to the division, department or any board which requests that a disciplinary proceeding he commenced against a credential holder or which alleges facts, which if true, warrant discipline. "Informal complaint" includes requests for disciplinary proceedings under s. 440.20, Stats.

(6) "Medical review officer" means a medical doctor or doctor of osteopathy who is a licensed physician and who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with an individual's medical history and any other relevant biomedical information.

(7) 'Procedure" means the impaired professionals procedure.

(8) "Program" means any entity approved by the department to provide the full scope of drug testing services for the department.

History: Cr. Register, January, 1991. No. 421, eff. 2-1-91; am. (1), (2), (5), cr. (2a), (2b), r. (6), Register, July, 1996. No. 487, eff. 8-1-96; cr. (6) and (8), Register, January, 2001, No. 541, eff. 2-1-01.

RL 7.03 Referral to and eligibility for the procedure. (1) All informal complaints involving allegations of impairment due to alcohol or chemical dependency shall be screened and investigated pursuant to s. RL 2.035. After investigation, informal complaints involving impainncnt may be referred to the procedure and considered for eligibility as an alternative to formal disciplinary proceedings under ch. RL 2.

(2) A credential holder who has been referred to the procedure and considered for eligibility shall be provided with an application for participation, a summary of the investigative results in the form of a draft statement of conduct to he used as a basis for the statement of conduct under s. RL 7.05 (1) (a), and a written explanation of the credential holder's options for resolution of the matter through participation in the procedure or through the formal disciplinary process pursuant to ch. RL 2.

(3) Eligibility for the procedure shall be determined by the board liaison and coordinator who shall review all relevant materials including investigative results and the credential holder's application for participation. Eligibility shall be determined upon criteria developed by each credentialing authority which shall include at a minimum the credential holder's past or pending criminal, disciplinary or malpractice record, the circumstances of the credential holder's referral to the department, the seriousness of other alleged violations and the credential bolder's prognosis for recovery. The decision on eligibility shall he consistent with the purposes of these procedures as described in s. RL 7.01 (2). The hoard liaison shall have responsibility to make the determination of eligibility for the procedure.

(4) Prior to the signing of an agreement for participation the Credential holder shall obtain a comprehensive assessment for chemical dependency from a treatment facility or individual therapist approved under s. RL 7.06. The credential holder shall arrange for the treatment facility or individual therapist to file a copy of its assessment with the board liaison or coordinator. The assessment shall include a statement describing the credential holder's prognosis for recovery. Tkc board liaison and the credential holder may agree to waive this requirement.

(5) If a crcdcntial holder is determined to bc ineligible for the procedure, the credential holder shall he referred to the division for prosecution.

(6) A crcdential holder determined to bc ineligible for the procedure by the board liaison or the department may, within 10 days of notice of the determination, request the credentialing authority to review the adverse determination.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91; am. (2) to (6), Register, July, 1996, No. 487, eff. 8–1–96.

RL 7.04 Requirements for participation. (1) A credential holder who participates in the procedure shall:

(a) Sign an agreement for participation under *s.* RL 7.05.

(b) Remain free of alcohol, controlled substances, and prescription drugs, unless prescribed for a valid medical purpose.

(c) Timely enroll and participate in a program for the treatment of chemical dependency conducted by a facility or individual therapist approved pursuant to s. RL 7.06.

(d) Comply with any treatment recommendations and work restrictions or conditions deemed necessary by the hoard liaison or department.

(e) Submit random monitored blood or urine samples for the purpose of screening for alcohol or controlled substances provided by a drug testing program approved hy the department under s. RL 7.11, as required.

(f) Execute releases valid under state and federal law in the form shown in Appendix I to allow access to the credential holder's counseling, treatment and monitoring records.

(g) Have the credential holder's supervising therapist and work supervisors file quarterly reports with the coordinator.

(h) Notify the coordinator of any changes in the credential holder's employer within 5 days.

(i) Pile quarterly reports documenting the credential holder's attendance at meetings of self–help groups such as alcoholics anonymous or narcotics anonymous.

(2) If the board liaison or department determines, based on consultation with the person authorized to provide treatment to the credential holder or monitor the credential holder's enrollment or participation in the proccdure, or monitor any drug screening requirements or restrictions on employment under sub. (1), that a credential holder participating in the procedure has failed to meet any of the requirements set under sub. (1), the board liaison may request that the hoard dismiss the credential holder from the procedure. The board shall review the complete record in making this determination. If the credential holder is dismissed the matter shall be referred to the division

(3) If a crcdcntial holdcr violates the agreement and the board docs not dismiss and refer the credential holdcr to the division, then a new admission under s. RL 7.08 (1) (a) shall he obtained for violations which arc substantiated.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91: am. **Register,** July, 1996. No. 487, eff. 8–1–96; **am. (1) (e), Resister. January, 2001, No. 541, eff. 2–1–01.**

RL 7.05 Agreement for participation. (1) The agreement for participation in the procedure shall at a minimum include:

(a) A statement describing conduct the credential holder agrees occurred relating to participation in the proccdure and an agreement that the statement may he used as evidence in any disciplinary proceeding undcr ch. RL 2.

(b) An acknowledgement by the credential holder of the need for treatment for chemical dependency;

(c) An agreement to participate at the credential holder's expense in an approved treatment regimen.

(d) An agreement to submit to randommonitored drug screens provided by a drug testing program approved by the department under s. RL 7.11 at the credential holder's expense, if deemed necessary by the hoard liaison.

(e) An agreement to submit to practice restrictions at any time during the treatment regimen as deemed necessary by the board liaison.

(f) An agreement to furnish the coordinator with signed consents for release of information from treatment providers and employers authorizing the release of information to the coordinator and hoard liaison for the purpose ot'monitoring the credential holder's participation in the procedure.

(g) An agreement to authorize the board liaison or coordinator to release information described in pars. **(a),** (c) and (e), the fact that a credential holder has hccn dismissed under s. RL 7.07 (3) (a) or violated terms of the agreement in s. RL 7.04 (1) (b) to (e) and (h) concerning the credential holder's participation in the procedure to the employer. therapist or treatment facility identified by the credential holder and an agreement to authorize the coordinator to release the results of random monitored drug screens under par. (d) to the therapist identified by the credential holder.

(h) An agreement to participate in the procedure for a period of time as established by the board.

(2) The board liaison may include additional rcquircments for an individual credential holder, if the circumstances of the informal complaint or the credential holder's condition warrant additional safeguards.

(3) The board or board liaison may include a promise of confidentiality that all or certain records shall remain closed and not available for public inspection and copying.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91; am. (1) (a) to (g) and *(2).* Register, July, 1996, No. 487, eff. 8–1–96; **am. (1) (d), Register, January, 2001, No. 541, eff. 2–1–01.**

RL 7.06 Standards for approval of treatment facilities or individual therapists. (1) The board or board liaison shall approve a treatment facility designated by a credential holder for the purpose of participation in the procedure if:

(a) The facility is certified by appropriate national or state certification agencies.

(b) The treatment program focus at the facility is *on* the individual with drug and alcohol abuse problems.

(c) Facility treatment plans and protocols are available to the board liaison and coordinator.

(d) The facility, through the credential holder's supervising therapist, agrees to file reports as required, including quarterly progress reports and immediate reports if a credential holder withdraws from therapy, relapses, or is believed to be in an unsafe condition to practice.

(2) As an alternative to participation by means of a treatment facility. a credential holder may designate an individual therapist for the purpose of participation in the procedure. The board liaison shall approve an individual therapist who:

(a) Has credentials and experience determined hy the hoard liaison to be in the credential holder's area of need.

(h) Agrees to perform an appropriate assessment of the credential holder's therapeutic needs and to establish and implement a comprehensive treatment regimen for the credential holdcr.

(c) Forwards copies of the therapist's treatment regimen and office protocols to the coordinator.

(d) Agrees to file reports as required to the coordinator. including quarterly progress reports and immediate reports if a credential holder withdraws from therapy, relapses. or is believed to he in an unsafe condition to practice.

(3) If a board liaison does not approve a treatment facility or therapist as requested by the credential holder. the credential holder may, within 10 days of notice of the determination, request the board to review the board liaison's adverse determination.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91; am. Register, July, 1996, No. 487, eff. 8–1–96; r. **(1) (d) and (2) (d), renum. (1) (e) and (2) (e) to be (1) (d) and (2) (d) and am., Register, January, 2001, No. 541, eff. 2–1–01.**

RL 7.07 Intradepartmental referral. (1) A credential holder who contacts the department and requests to participate in the procedure shall be referred to the board liaison and the coordinator for determination of acceptance into the procedure.

(2) The division may refer individuals named in informal complaints to the board liaison for acceptance into the procedure.

(3) The board liaison may refer cases involving the following to the division for investigation or prosecution:

(a) Credential holders participating in the procedure who are dismissed for failure to mect the requirements of their rehabilitation program or who otherwise engage in behavior which should be referred to prevent harm to the public.

(b) Credential holders who apply and who are determined to be ineligible for the procedure where the board liaison is in possession of information indicating a violation of law.

(c) Credential holders who do not complete an agreement for participation where the board liaison is in possession of information indicating a violation of law.

(d) Credential holders initially referred by the division to the board liaison who fail to complete an agreement for participation.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91; am. (1), (3) (a) to (d), Register. July, 1996, No. 487, eff. 8–1–96.

RL 7.08 Records. (1) CUSTODIAN. All records relating to the procedure including applications for participation, agreements for participation and reports of participation shall be maintained in the custody of the department secretary or the secretary's designee.

(2) AVAILABILITY OF PROCEDURE RECORDS FOK PUBLIC INSPECTION. Any requests to inspect procedure records shall be made to the custodian. The custodian shall evaluate each request on a case by case basis using the applicable law relating to open records and giving appropriate weight to relevant factors in order to determine whether public interest in nondisclosure outweighs the public interest in access to the records, including the reputational interests of the credential holder, the importance of confidentiality to the functional integrity of the procedure, the existence of any pledge of confidentiality, statutory or common law rules which accord a status of confidentiality to the records and the likelihood that release of the records will impede an investigation.

(3) TREATMENT RECORDS. Treahnent records concerning individuals who arc receiving or who at any time have received services for mental illness, developmental disabilities, alcoholism, or drug dependence which are maintained by the department, by county departments under s. 51.42 or 51.437, Stats., and their staffs and by treatment facilities are confidential under s. 51.30, Stats., and shall not be made available for public inspection

(4) PATIENT HEALTH CARE RECORDS. Patient health care records are confidential under s. 146.82, Stats., and shall not be made available to the public without the informed consent of the patient or of a person authorized by the patient or as nrovided under s. 146.82 (2), Stats.

History: Cr. Register, January, 1991, No. 421, cff.2–1–91; am. (2), Register. July, 1996, No. 487, eff. 8–1–96.

RL 7.09 Report. The board liaison or coordinator shall report on the procedure to the board at least twice a year and if requested to do so by a board.

History: Cr. Register, January, 1991, No. 421, eff. 2–1–91; am. Register, July, 1996, No. 487, eff. 8–1–96.

RL 7.10 Applicability *of* procedures to direct licensing by the department. This procedure may be used by the department in resolving complaints against persons licensed directly by the department if the department has authority to discipline the credential holder. In such cases, the department secretary shall have the authority and responsibility of the "hoard" as the term is used in the procedure and shall designate an employee to perform the responsibilities of the "board liaison."

History: Cr. Register. January, 1991, No. 421, eff. 2–1–91; am. Register, July, 1996, No. 487, eff. 8–1–96.

RL 7.11 Approval of drug testing programs. The department shall approve drug testing programs for nse by credential holders who participate in drug and alcohol monitoring programs pursuant to agreements between the department or boards and credential holders, or pursuant to disciplinary orders. To he approved as a dnig testing program for the department, programs shall satisfactorily mect all of the following standards in the areas of program administration, collection site administration, laboratory requirements and reporting requirements:

(1) Program administration requirements are:

(a) The program shall enroll participants by setting up an account, establishing a method of payment and supplying preprinted chain–of–custody forms.

(b) The prograin shall provide the participant with the address and phone number of the nearest collection sites and shall assist in locating a qualified collection site when traveling outside the local area.

(c) Random selection of days when participants shall provide specimens shall begin upon enrollment and the program shall notify designated department staff that selection has begun.

(d) The program shall maintain a nationwide 800 number or an internet website that is operational 24 hours per day. 7 days per week to inform participants of when to provide specimens.

(e) The program shall maintain and make available to the department through an internet website data that are updated on a daily basis verifying the date and time each participant was notified after random selection to provide a specimen, the date, time and location each specimen was collected, the results of drug screen and whether or not the participant complied as directed.

(f) The program shall maintain internal and cxtemal quality of test results and other services.

(g) The program shall maintain the confidentiality of participants in accordance with s. 146.82, Stats.

(h) The program shall inform participants of the total cost for each drug screen including the cost for program administration, collection, transportation, analysis, reporting and confinnation. Total cost shall not include the services of a medical review officer.

(i) The program shall immediately report to the department if the program, laboratory or any collection site fails to comply with this section. The department may remove a program from the approved list if the program fails to comply with this section.

(j) The program shall make available to the department experts to support a test result for 5 years after the test results are released to the department.

(k) The program shall not sell or otherwise transfer or transmit names and other personal identification information of the participants to other persons or entities without permission from the department. The program shall not solicit from participants presently or formerly in the monitoring program or otherwise contact participants except for purposes consistent with administering the program and only with permission from the department.

(L) The program and laboratory shall not disclose to the participant or the public the specific drugs tested.

(2) Collection Site administration requirements are:

(a) The program shall locate. train and monitor collection sites for compliance with the U.S. deparhnent of transportation collection protocol under 49 CFR 40.

(b) Theprograin shall require delivery of specimens to the laboratory within 24 hours of collection.

(3) Laboratory requirements are:

(a) The program shall utilize a laboratory that is certified by the U.S. department of health and human services, substance abuse and mental health services administration under 49 CFR 40. If the laboratory has had adverse or corrective action, the department shall evaluate the laboratory's compliance on a case by case basis.

(b) The program shall utilize a laboratory capable of analyzing specimens for drugs specified by the department.

(c) Testing of specimens shall be initiated within 48 hours of pickup by courier.

(d) All positive drug screens shall be confirmed utilizing gas chromatography in combination with mass spectrometry, mass spectrometry, or another approved method.

(e) The laboratory shall allow department personnel to tour facilities where participant specimens are tested.

(4) The requirements for reporting of results are:

(a) The program shall provide results of each specimen to designated department personnel within 24 hours of processing.

(b) The program shall inform designated department personnel of confirmed positive test results on the same day the test results are confirmed or by the next business day if the results are confirmed after hours, on the weekend or on a state or federal holiday.

(c) The program shall fax, e–mail or electronically transmit laboratory copies of drug test results at the request of the department.

(d) The program shall provide a medical review officer upon request and at the expense of the participant, to review disputed positive test results.

(e) The program shall provide chain–of–custody transfer of disputed specimens to an approved independent laboratory for retesting at the request of the participant or the department.

History: Cr. Register, January, 2001, No. 541, eff. 2–1–01.

Chapter RL 7

APPENDIX I

CONSENT FOR RELEASE OF INFORMATION

I, (XI), hereby authorize (#2) to provide the board liaison for the Department of Regulation and Licensing Impaired Professionals Procedure, P.O. Box 8935, Madison, Wisconsin 53708, or persons designated by the board liaison who are directly involved in administration of the procedure, with (#3). I further authorize (#4) to discuss with the board liaison or the board liaison's designee any matter relating to the records provided and to allow the board liaison or the board liaison's designee to examine and copy any records or information relating to me.

I hereby also authorize the board liaison or the board liaison's designee to provide (#5) with copies of any information provided to the board liaison pursuant to this consent for release of information authorizing the release of information to the board liaison from those persons and institutions.

In the event of my dismissal from the Impaired Professionals Procedure, I hereby also authorize the board liaison or the board liaison's designee to provide the Division of Enforcement with the results of any investigation conducted in connection with my application to participate in the Impaired Professionals Procedure and with any documentation, including patient health care records, evidencing my failure to meet participation requirements.

This consent for release of infomation is being made for the purposes of monitoring my participation in the Impaired Professionals Procedure, and any subsequent procedures before the Wisconsin (a6); and for the further purpose of permitting exchange of information between the board liaison or the board liaison's designee and persons or institutions involved in my participation in the Impaired Professionals Procedure where such exchange is necessary in the furtherance of my treatment or to provide information to the Division of Enforcement in the event of my dismissal from the Impaired Professionals Procedure.

Unless revoked earlier, this consent is effective until (#7). I understand that I may revoke this consent at any time and that information obtained as a result of this consent may be used after the above expiration date or revocation. A reproduced copy of this consent form shall be as valid as the original.

I understand that should I fail to execute this consent for release of information, I shall be ineligible to participate in the Impaired Professionals Procedure. I also understand that should I revoke this consent prior to completion of my participation in the Impaired Professionals Procedure, I will be subject to dismissal from the procedure.

I understand that the recipient of infomiation provided pursuant to this Consent for Release of Information is not authorized to make any further disclosure of the information without my specific written consent, or except as otherwise permitted or required by law.

Dated this _____ day of _____, 19___.

_____

Signature of IPP Participant Participant's Date of Birth

INSERTIONS

1. Participant
2. Persons and institutions provided with releases for provision of information to the department
3. Examples: Drug and alcohol treatment records
   Mental health/psychiatric treatment records
   Personnel records; work records
   Results of blood or urine screens
4. Persons or institutions given authorization
5. Persons or institutions given authorization in the first paragraph
6. Name of board
7. Date to which consent is effective

Chapter RL 8

ADMINISTRATIVE WARNINGS

RL 8.01 Authority and scope. Rules in this chapter are adopted under the authority of s. 440.205, Stats., to establish uniform procedures for the issuance and use of administrative warnings.

History: Cr. Register, January, 1999, Nu. 517, eff. 2–1–99.

RL 8.02 Definitions. As used in s. 440.205, Stats., and in this chapter:

(1) "Credential" means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480, Stats.

(2) "Department" means the department of regulation and licensing.

(3) "Disciplinary authority" means the department or an attached examining board, affiliated credentialing board or hoard having authority to reprimand a credential holder.

(4) "Division" means the division of enforcement in the department.

(5) "First occurrence" means any of the following:

(a) The credential holder has never been charged as a respondent in a formal complaint filed under ch. RL 2.

(h) Other than the matter pending before the disciplinary authority, no informal complaint alleging the same or similar misconduct has been filed with the department against the credential holder.

(c) The credential holder has not been disciplined by a disciplinary authority in Wisconsin or another jurisdiction.

(6) "Minor violation" means all of the following:

(a) No significant harm was caused by misconduct of the credential holder.

(h) Continued practice by the credential holder presents no immediate danger to the public.

(c) If prosecuted, the likely result of prosecution would be a reprimand or a limitation requiring the credential holder to obtain additional education.

(d) The complaint does not warrant use of prosecutorial resources.

(e) The credential holder has not previously received an administrative warning.

(7) "Misconduct" means a violation of a statute or rule related to the profession or other conduct for which discipline may be imposed under chs. 440 to 480, Stats.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

RL 8.03 Findings before issuance of an administrative warning. Before issuance of an administrative warning, a disciplinary authority shall make all of the following findings:

(1) That there is specific evidence of misconduct by the credential holder.

(2) That the misconduct is a first occurrence for the credential holder.

(3) That the misconduct is a minor violation of a statute or rule related to the profession or other conduct for disciplinc may hc imposed.

(4) That issuance of an administrativc warning will adequately protect the public.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

RL 8.04 issuance of an administrative warning. **(1)** An administrative warning shall be substantially in the form shown in Appendix I.

(2) An administrative warning may be issued to a credential holder hy mailing the administrativc warning to the last address provided by the credential holder to the department. Service by mail is complete on the date of mailing.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

RL 8.05 Request for a review of an administrative warning. A credential holder who has been issued an administrative warning may request the disciplinary authority to review the issuance of the administrative warning by filing a written request with the disciplinary authority within 20 days after the mailing of the administrative warning. The request shall be in writing and set forth:

(1) The credential holder's name and address.

(2) The reason for requesting a review.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

RL 8.06 Procedures. The procedures for an administrative warning review are:

(1) Within 45 calendar days of receipt of a request for review, the disciplinary authority shall notify the credential holder of the time and place of the review.

(2) No discovery is permitted. A credential holder may inspect records under s. 19.35, stals., the public records law.

(3) The disciplinary authority or its designee shall preside over the review. The review shall he recorded hy audio tape unless otherwise specified by the disciplinary authority.

(4) The disciplinary authority shall provide the credential holder with an opportunity to make a personal appearance before the disciplinary authority and present a statement. The disciplinary authority may request the division to appear and present a statement on issues raised by the credential holder. The disciplinary authority may establish a time limit for making a presentation. Unless otherwise determined by the disciplinary authority. the time for making a personal appearance shall be 20 minutes

(5) If the credential holder fails to appear for a review, or withdraws the request for a review, the disciplinary authority may note the failure to appear in the minutes and leave the administrative warning in effect without further action.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

RL 8.07 Transcription fees. (1) The fee charged for a transcript of a review under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount idcntificd in the state operational purchasing bulletin which identifies the reporting service and its fees.

(b) If a transcript is prepared by the department, the department shall charge a transcription fee of $1.75 per page and a copying charge of $.25 per page. If 2 or more persons request a transcript, the department shall charge each requester a copying fee of $.25 per page, but may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee of $.25 per page.

(2) A person who is without means and who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of a petition of indigence signed under oath.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Chapter RL 8

APPENDIX I

DEPARTMENT OF REGULATION AND LICENSING

[DISCIPLINARY AUTHORITY]

ADMINISTRATIVE WARNING

This administrative warning is issued by the {disciplinary authority} to {credential holder} pursuant to s 440.205, Stats. The {disciplinary authority) makes the following findings:

1) That there is evidence of professional misconduct by {credential holder}, to wit:

2) That this misconduct is **a** first occurrence for {credential holder].

3) That this misconduct is **a** minor violation of {statute or rule}.

4) That issuance of this administrative warning will adequately protect the public and no further action is **warranted.**

Therefore, the {disciplinary authority} issues this administrative warning and hereby puts the {credential holder) on notice that any subsequent violation may result in disciplinary action. The investigation of this matter is hereby closed

Date:_____ _____

Signature of authorized representative
For {Disciplinary Authority}

Right to Review

You may obtain a review of this administrative warning by filing a written request with the {disciplinary authority} within 20 days of mailing of this warning. The review will offer the credential holder an opportunity to make a personal appearance before the {disciplinary authority}.

The record that this administrative warning was ***issued*** is *a public record.*

The *content of this warning is private and confidential.*

Chapter RL 9

DENIAL OF RENEWAL APPLICATION BECAUSE APPLICANT IS LIABLE FOR DELINQUENT TAXES

RL 9.01 Authority. The rules in ch. RL 9 are adopted under the authority ins. 440.03, Stats.

History: Emerg. cr. eff. 11–14–96: Cr. Register, August, 1996. No. 488, eff. 9–1–96.

RL 9.02 Scope; nature of proceedings. The rules in this chapter govern the procedures for requesting the Wisconsin department of revenue to certify whether an applicant is liable for delinquent taxes owed to this state under s. 440.08 (4) (b), Stats., as created by 1995 Wis. Act 27 and amended by 1995 Wis. Act **233,** to review denial of an application for renewal because the applicant is liable for delinquent taxes.

History: Emerg. cr. eff. 11–14–96; Cr. Register, August, 1996, No. 488, eft 9–1–96.

RL 9.03 Definitions. In this chapter:

(1) "Applicant" means a person who applies for renewal of a credential. "Person" in this subsection includes a business entity.

(2) "Credential" has the meaning in s. 440.01 **(2)** (a), Stats.

(3) "Department" means the department of regulation and licensing.

(4) "Liable for any delinquent taxes owed to this state" has the meaning set forth in s. 73.0301 (1) (c), Stats.

History: Emerg. cr. eff. 11–14–96; Cr. Register, August, **1996, No. 488,** eff. 9–1–96; **correction in (4) made under s. 13.93 (2m) (b) 7., Stats.**

RL 9.04 Procedures for requesting the department of revenue to certify whether an applicant for renewal is liable for delinquent taxes. (1) RENEWAL APPLICATION FORM. If the department receives a renewal application that does not include the information required by s. 440.08 (2g) (b), Stats., the application shall be denied unless the applicant provides the missing infomiation w-ithin **20** days after the department first received the application.

Note: 1997 Wis. **Act 191** repealed s. 440.08 (2g) (b), Stats.

(2) SCREENING FOR LIABILITY FOR DELINQUENT TAXES. The name and social security number or federal employer identification number of an applicant shall be compared with information at the Wisconsin department of revenue that identifies individuals and organizations who are liable for delinquent taxes owed to this state.

(3) NOTICE OF INTENT TO DENY BECAUSE OF TAX DELINQUENCY. If an applicant is identified as being liable for any delinquent taxes owed to this state in the screening process under sub. (2), the Wisconsin department of revenue shall mail a notice to the applicant at the last known address of the applicant according to s. 440.11, Stats., or to the address identified in the applicant's renewal application, if different from the address on file in the department. The notice shall state that the application for renewal submitted by the applicant shall be denied unless, within 10 days from the date of the mailing of the notice, the department of regulation and licensing receives a copy of a certificate of tax clearance issued by the Wisconsin department of revenue which shows that the applicant is not liable for delinquent state taxes or unless the Wisconsin depariment of revenue provides documentation to the department showing that the applicant is not liable for delinquent state taxes.

(4) OTHER REASONS FOR DENIAL. If the department determines that grounds for denial of an application for renewal may exist other than the fact that the applicant is liable for any delinquent taxes owed to this state, the department shall make a determination on the issue of tax delinquency before investigating other issues of renewal eligibility.

History: Emerg. cr. eff. 11–14–96; Cr. Register, August, 1996, No. 488, **eff. 9–1–96.**

RL 9.05 Denial of renewal. The department shall deny an application for credential renewal if the applicant fails to complete the information on the application form under s. RL 9.04 or if the Wisconsin department of revenue certifies or affirms its certification under s. 440.08 **(4)** (b) 3., Stats., that the applicant is liable for delinquent taxes and the department does not receive a current certificate of tax clearance or the Wisconsin depamnent of revenue does not provide documentation showing that the applicant is not liable for delinquent taxes within the time required under s. RL 9.04 (2) and *(3).* The department shall mail a notice of denial to the applicant that includes a statement of the facts that warrant the denial under s. 440.08 (4) (b), Stats., and a notice that the applicant may file a written request with the department to have the denial reviewed at a hearing before the Wisconsin dcpartmcnt of revenue.

Note: Section 440.08 **(4)**(b) 3., Stats., referred to here was repealed by 1997 Wis. Act 237 and a new, unrelated s. **440.08 (4)**(b) **recreated.**

History: Emerg. cr. eff. 11–14–96: Cr. Register, August. 1996, No. 488, eff. 9–1–96.

Chapter RL 30

PRIVATE DETECTIVE AND AGENCY AUTHORITY AND DEFINITIONS

RL 30.01 Authority. The mlcs in this chapter are adopted pursuant toss. 227.11 (2) and 440.26, Stats.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. Register. November, 1997, No. 503, eff. 12–1–97.

RL 30.02 Definitions. In chs. RL 30 to 35:

(1) "Agency" or "private detective agency" means an individual, partnership; limited liability company, or corporation holding a private detective agency license issued by the department or having a right *to* renew a license issued by *the department* to act as or employ private detectives or private security persons.

(1m) "Client" means a person for whom a private detective agency agrees to provide private detective services, as described in sub. (12) (a), or to supply private security personnel.

(1n) "Credential" has the meaning in s. 440.01 (2) (a), Stats.

(2) "Department" means the department of regulation and licensing.

Note: The department office is located at Room 281, 1400 Earl Washington Avenue, Madison, Wisconsin 53702, telephone (608)266–0829.

(3) "Employe" means any person who receives earnings as payment for personal services rendered for the benefit of an employer. A person who is listed on an employer's payroll records and for whom federal and state payroll deductions are taken and payroll taxes paid is presumed to he an employe. However, a person is not an employe unless the employer has a right to control and direct the employe who performs the services as to the result to he accomplished hy the services and as to the details and means by which the result is to be accomplished

(4) "Firearm" means a weapon from which a shot is discharged hy gunpowder, including hut not limited to handguns and shotguns.

(5) 'Eicense" means a license issued by the department to a private detective agency or to a private detective under s. 440.26, Stats.

(6) "Officer" means the president, vice–president, secretary or treasurer of a corporation.

(7) "On duty" means that time during which a private detective or private security pcrson:

(a) Receives or is entitled to receive fees or other compensation for services as a private detective or a private security person; or

(b) Acts as a private detective or private security person.

(8) "Original agency license" means:

(a) A license issued to an agency which does not hold an agency license at the time it makes application and which is not eligible to renew a license; or

(b) A license issued to an agency which has applied for a license under s. RL 32.07 after undergoing a change of controlling ownership.

(9) "Original private detective license" means a license issued to a person who does not hold a private detective license at the time the person makes application and who is not eligible to renew the license.

(10) "Owner" means the owner of an agency. For the purpose of chs. RL 30 to 35:

(a) The owner of a sole proprietorship is the license holder.

(b) The owners of a corporation are the officers of the corporation.

(c) The owners of a partnership are the partners.

(d) The owners of a limited liability company are the members.

(10g) "Peace officer" has the meaning given in s. 939.22 (22), Stats.

(11) "Permit" means the privatc security permit described in s. 440.26 (5m), Stats., or a firearms permit described in s. RL 34.015.

(12) (a) "Private detective" means any of the following:

1. A person who acts as. advertises or otherwise represents that the person is a private detective, private investigator or special investigator.

2. A person cngagcd for compensation or other consideration on behalf of another, in investigating or otherwise obtaining or furnishing information relating to any of the following:

a. Crimes or wrongs done or threatened against the United States, any state or territory, or any political subdivision thereof

b. The identity, conduct, business, honesty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character of any person, if such infonnation is obtained in secret, without the knowledge of the person being observed.

c. The location, disposition or recovery of lost or stolen property.

d. The cause or responsibility for fires, libels, losses, accidents, damage, injury or death.

e. Securing evidence to be used before any court, public board, officer, or investigating committee.

3. A person who acts as a private security pcrson and does not wear a uniform, including one who provides personal protection of individuals from bodily harm or death.

(b) "Private detective" does not include any of the following:

1. A public officer or employe while performing an official duty.

2. A person exempt from the licensing requirement under s. 440.26 (5), Stats.

4. An individual, the members of a partnership and the officers of a corporation having a private detective agency license who are not engaged in the work of a private detective.

5. Off–duty law enforcement officers when employed by a person or entity and when such employment has been officially authorized by the officer's law enforcement employment department or agency as an appropriate extension of the officer's function; provided that the law enforcement agency gives the hiring person or entity a written statement concerning who is responsible or liable for the actions of the off–duty law enforcement officer while that person is performing services for the hiring person or entity.

6. Persons licensed by this state for activities other than those under s. 440.26, Stats., when performing acts within the scope of their license.

I. Persons directly employed by an insurer and persons working as insurance adjusters under contract with an insurer.

8. Persons employed to act as shoppers in business establishments and report on the efficiency of employes, the quality of services or the condition of the premises.

Note: Persons engaged in posing as patrons for the purpose of checking honesty of employer and then reporting to the employer are required to be licensed.

9. Persons contracted as consultants to a private detective or private detective agency and who perform no investigatory work of any kind themselves

10. Scientific researchers, laboratory personnel and expert consultants who may provide testimony to any court, board, officer or investigating committee

11. A person who is not licensed as a private detective in Wisconsin, who commences an investigation in another jurisdiction and who physically enters into Wisconsin for the purpose of pursuing that investigation, provided that the person is accompanied by a licensed private detective while conducting the investigation and that the person is not armed with a firearm.

(13) (a) "Private security person" means any private police. guard or any person who stands watch for security purposes. Except as provided in par. (b) 2., "private security person" includes a person employed by a private detective agency to act as an usher, a ticket-taker or an event attcndant at events which include, but are not limited to, athletic events, concerts, fairs; festivals and trade shows.

(b) "Private security person" docs not include any of the following:

1. An off–duty law enforcement officer when employed by a person or entity and when such employment has been officially authorized by the officer's law enforcement employment department or agency as an appropriate extension of the officer's function; provided that the law enforcement agency gives the hiring person or entity a written statement concerning who is responsible or liable for the actions of the off–duty law enforcement officer while that person is performing services for the hiring person or entity.

2. A person employed by a private detective agency who acts as an usher, ticket–taker or event attcndant at events which include, but are not limited to, athletic events, concerts, fairs, festivals and trade shows, provided that all of the following conditions are met:

a. The person does not wear any clothing; badge, patch or lettering which identifies the person as one who provides a security function at the event or who refers to himself or herself by a title, such as a private security person, a private police officer or a private public safety person.

b. The person is not armed with a dangerous weapon.

(14) "Uniform" means any clothing, badge, patch or lettering which clearly identifies to the public a person being a security guard.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; cr. (12) (b) 11., Register, December, 1994, No. 468, eff. 1–1–95; am. (1), (7) (b), (11), (12) (a) 1., 2. e., (b) 2. and 5., cr. (1m), (1n), (10) (d), r. (12) (b) 3. and r. and recr. (13), Register, November, 1997, No. 503, eff. 12–1–97; **am. (9), cr. (10g), Register, January, 2001, No. 541, eff. 2–1–01.**

Chapter RL 31

CREDENTIALING REQUIREMENTS AND PROCEDURES FOR PRIVATE DETECTIVE AGENCY, PRIVATE DETECTIVE AND SECURITY PERSON

RL 31.001 Authority. The rules in this chapter are adopted pursuant toss. 227.11 (2) and 440.26 (2), (3), (4), (5m) and (5r), Stats,

History: Cr. Register, November, 1997, No. 503, eff. 12–1–97.

RL 31.01 Credential required. (1) PRIVATE DETECTIVE AGENCY. (a) Except as provided in par. (c), a person shall obtain a private detective agency license before engaging in the following activities:

1. Advertising, soliciting or engaging in the business of a private detective agency.

2. Acting as a private detective, private investigator, investigator or private security person.

3. Acting as a supplier of private security personnel.

4. Soliciting business or performing any other type of service or investigation as a private detective or private security person.

5. Receiving any fees or compensation for acting as any person, engaging in any business or performing any service specified in subds. 1. to 4.

(b) A private detective agency license may be issued to an individual, a partnership, a limited liability company or a corporation.

(c) An individual who holds a license as a private detective or a permit as a private security person and who is employed by a licensed private detective agency is not required to obtain a private detective agency license before acting as a private detective or a private security person.

(2) PRIVATE DETECTIVE LICENSE. (a) A private detective license is required to engage in the services of a private detective.

(b) A private detective may only provide private detective services on behalf of a private detective agency in the capacity of an employee and not as an independent contractor, unless the private detective has a private detective agency license.

(3) PRIVATE SECURITY PERMIT. (a) An employee of any licensed private detective agency doing business in this state as a supplier of uniformed private security persons to patrol exclusively on the private property of industrial plants, business establishments, schools, colleges, hospitals, sports stadiums, exhibits and similar activities is exempt from the license requirements under sub. (2), but shall obtain a private security permit as specified in s. 440.26 (5m) or (5r), Stats.

(h) A licensed private detective may be employed as a private security person without obtaining a private security permit.

History: Cr. Register, October, 1988. No. 394, eff. 11–1–88; r. and recr. (1), renum. and am. (2) to be (3) (a), cr. (3) (b), Register, November, 1997, No. 503, eff. 12–1–97.

RL 31.02 Qualifications. (1) PRIVATE DETECTIVE AGENCY LICENSE. (a) To obtain a license as a private detective agency, an individual applicant, all members of a partnership or a limited liability company, or all corporate officers shall be listed on the application. The application of a partnership or a limited liability company shall be executed by all members of the partnership or limited liability company. An application of a corporation shall be executed by the secretary and the president or the vice president and, in addition, in the case of a foreign corporation, by the registered agent.

(b) A license may be panted under this section if the individual applicant or the members of a partnership or a limited liability company or all corporate officers who executed the application:

1. Subjecttoss. 111.321, 111.322 and 111.335, Stats., do not have an arrest or conviction record involving a misdemeanor or a violation, as defined in s. 440.26 (4m), Stats.

Im. Have not been convicted in this state or elsewhere of a felony, unless pardoned.

2. Are not users of drugs or alcohol to an extent dangerous to themselves or to other persons or to an extent which could impair a person's ability to direct or perform private detective or private security activities responsibly.

3. Does not have a physical, emotional or mental condition that might adversely affect the applicant's ability to responsibly direct or perform private detective or private security activities.

(2) PRIVATE DETECTIVE LICENSE. An applicant for licensure as a private detective may hc granted a license under s. 440.26, Stats., if the applicant:

(a) Subjectto ss. 111.321, 111.322 and 111.335, Stats., does not have an arrest or conviction record involving a misdemeanor or a violation, as defined in s. 440.26 (4m), Stats.

(am) Has not been convicted in this state or elsewhere **of** a felony, unless pardoned.

(b) Is not a user of drugs or alcohol to an extent dangerous to the applicant or others or to an extent which would impair the applicant's ability to perform private detective or private security activities responsibly;

(c) Has passed the examination administered by the department as set forth in s. RL 31.04.

(d) Does not have a physical, emotional or mental condition that might adversely affect the applicant's ability to responsibly perform private detective or private security activities.

(3) PRIVATE SECURITY PERSON PERMIT. An applicant for a permit as a private security person may he granted a permit under s. 440.26, Stats., if the applicant:

(a) Subject to ss. 111.321, 111.322 and 111.335, Stats., docs not have an arrest or conviction record involving a misdemeanor or a violation, as defined in s. 440.26 (4m), Stats.

(b) Has not been convicted in this state or elsewhere of a felony, unless pardoned.

(c) Is not a nscr of drugs or alcohol to an extent dangerous to the applicant or others or to an extent which would impair the applicant's ability to responsibly perform private security activities.

(d) Does not have a physical, emotional or mental condition that might adversely affect the applicant's ability to responsibly perform private security activities.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. (1) (a), (b) (intro.), 1., and (2) (a), cr. (1) (b) 1m., (2) (am) and (3), Register, November, 1997, No. 503, eff. 12–1–97; cr. (1) (b) 3., (2) (d) and (3) (d), Register, January, 2001, No. 541, eff. 2–1–01

RL 31.03 Application procedure for private detective agency licenses. (1) An applicant for a private detective agency license shall file with the department all of the following:

(a) A completed application on formsprovided by the department.

Note: Information about application deadlines is available from the bureau of direct licensing and real estate in the department at Room 281, 1400 East Washington Avenue, Madison. Wisconsin 53702, telephone (608)266–0829.

(b) Except as provided in sub. (1m), for each person who, pursuant to s. 440.26 (2) (b), Stats., executes the application. 2 complete and satisfactory sets of fingerprints on forms supplied by the department.

Note; Forms are available on request from the Department of Regulation and Licensing. Bureau of Direct Licensing and Red Estate, 1400 East Washington Avenue, P. O. Box 8935, Madison, Wisconsin 53708.

(c) One recent photograph of the applicant's head and shoulders only.

(d) A bond or liability policy. as required in s. 440.26 (4), Stats.

(e) The complete business location address of the applicant including the office or room number and street address. A post office box without a complete location address is inadequate.

(f) The fee specified ins. 440.05 (1), Stats.

(g) The costs incurred by the department in obtaining information related to the eligibility and qualifications of the applicant.

(1rn) A peace officer is not required to file with the department fingerprints under sub. (1) (b),.if the peace officer submits with the application for a license a letter from his or her employing law enforcement agency, written not more than one month before the date ofthc application and stating that the person is currently employed as a peace officer by the law enforcement agency.

(2) For each person who, pursuant to s. 440.26 (2) (b), Stats., executes the application, information about whether the person is or has, within the 5 yearspreceding the date of application, been a user of drugs or alcohol to an extent dangerous to the person or other persons or to an extent which could impair the person's ability to perform private detective or private security activities responsibly.

(3) The department shall provide reasonable accommodations to applicants with disabilities who are otherwise analified.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr., Register, November, 1997, No. 503, eff. 12–1–97; am. (1) (b), cr. (1m), Register. January, 2001, No. 541, eff. 2–1–01; correction in (1) (b) made under s. 13.93 (2m) (b) 7., Stats.

RL 31.034 Private detective agency's responsibility to obtain and maintain a bond or liability policy. (1) A private detective agency shall obtain and maintain a surety bond or liability policy as required under s. 440.26 (4), Stats. If an agency obtains a comprehensive general liability policy, the policy shall include coverage for bodily injury liability, property damage and personal injury. In any case, if an agency permits an officer or employee to carry a firearm in the course of duty, the agency shall obtain a liability policy which shall include coverage for injury or damage resulting from the use of firearms. Evidence of a comprehensive general liability policy shall consist of a certificate of insurance stating the licensee as insured and the department as certificate holder.

(2) Each licensee shall maintain without lapse in coverage the bond or comprehensive general liability policy submitted to the department before the issuance of an original or renewal license.

(3) If a private detective agency obtains a comprehensive general liability policy, the policy shall cover all licensed private detectives and private security personnel employed by the agency.

(4) An individual licensed employee is not required to obtain a bond or liability policy if the employee is covered by the employing agency's liability policy.

History: Cr. Register, November, 1997, No. 503. eff. 12–1–97.

RL 31.035 Application procedure for private detective licenses. (1) An applicant for a private detective license shall file with the department all ofthe following:

(a) A completed application on forms provided by the department.

(b) Except as provided in sub. (1m), 2 complete and satisfactory sets of fingerprints on forms supplied by the department,

Note: Forms are available on request to the Department of Regulation and Licensing. Bureau of Direct Licensing and Real Estate, 1400 East Washington Avenue, P.O. Box 8935. Madison. Wisconsin 53708.

(c) One recent photograph of the applicant's head and shoulders only.

(d) A $2,000 surety bond, if the applicant's private detective agency employer has obtained a bond pursuant to s. 440.26 (4),

(e) A complete address of the applicant. A post office box without a complete location address is inadequate.

(f) The fee specified ins. 440.05 (1), Stats.

(g) The costs incurred by the department in obtaining information related to the eligibility and qualifications of the applicant.

(h) A statement signed by an authorized representative of a licensed private detective agency, showing that the applicant will be employed by the agency when acting as a private detective.

(1m) A peace officer is not required to file with the department fingerprints under sub. (1) (b), provided that the peace officcr submits with the application for a license a letter from his or her employing law enforcement agency, written not more than one month before the date of the application and stating that the person is currently employed as a peace officer by the law enforcement agency.

(2) An applicant who is or who has, within the 5 years preceding the date of application, been a user of drags or alcohol to an extent dangerous to the person or other persons or to an extent which could impair the person's liability to perform private detective or private security activities responsibly shall provide the department all information necessary for the department to determine the applicant's fitness to practice.

(3) The department shall provide reasonable accommodations to applicants with disabilities who are otherwise qualified.

History: Cr. Register, November, 1997, No. 503, eff. 12–1–97; am. (1) (b), cr. (1m), Register, January, 2001, No. 541, eff. 2–1–01; correction in (1) (b) made under s. 13.93 (2m (b) 7., Stats.

RL 31.036 Application procedure for private security permits. (1) An applicant for a private security permit shall file with the department all of the following:

(a) A completed application on forms provided by the department.

(b) Except as provided in sub. (1m), 2 complete and satisfactory sets of fingerprints on forms supplied by the department.

Note: Forms are available on request to the Department of Regulation and Licensing, Bureau of Direct Licensing and Real Estate. 1400 East Washington Avenue, PO. Box 8935, Madison, Wisconsin 53708.

(c) One recent photograph of the applicant's head and shoulders only.

(d) A complete address of the applicant. A post office box without a complete location address is inadequate.

(e) The fee specified in s. 440.05 (1), Stats.

(9 The costs incurred by the department in obtaining information related to the eligibility and qualifications of the applicant.

(g) A statement signed by an authorized representative of a licensed private detective agency, showing that the applicant will be employed by the agency when acting as a private security person.

(1m) A peace officer is not reqnired to file with the department fingerprints under sub. (1) (b), provided that the peace officer submits with the application for a permit a letter from his or her employing law enforcement agency, written not more than one month before the date of the application and stating that the person is currently employed as a peace officer by the law enforcement agency.

(2) An applicant who is or who has, within the 5 years preceding the date of application, been a user of drugs or alcohol to an extent dangerous to the person or other persons or to an extent

which could impair the person's ability to perform private detective or private security activities responsibly shall provide the department all information necessary for the department to determine the applicant's fitness to practice.

(3) The department shall provide reasonable accommodations to applicants with disabilities who are otherwise qualified.

(4) The dcpartnicnt shall issue a temporary private security permit pursuant to s. 440.26 (5r), Stats.

History: Cr. Register, November, 1997, No. 503, eff. 12–1–97; am. (1) (b); cr. (1m), **Register,** January, 2001, No. 541, eff. 2–1–01; **correction in (1) (b) made under s. 13.93 (2m (b) 7., Stats.**

RL **31.04 Examination for private detective licensure. (1)** ADMINISTRATION. At least once every month the department shall administer or cause to be administered an cxaniination for the licensure of private detcctivcs.

(3) SUBJECTS TESTED. The examination shall test the applicant's knowledge or competence in those areas which the department, after consultation with subject matter experts, determines are appropriate for testing the applicant's knowledge for protection of public health and safety.

(4) DISHONEST ACT. *An* applicant may not engage in dishonest acts relating to the examination, The actions taken by the department when dishonest acts occur shall be related to the seriousness of the offense. These actions may include withholding the applicant's score, entering a failing grade for the applicant, and suspending the ability of the applicant to sit for an examination for a specific period of time after the examination in which the dishonest acts occurred.

(5) PASSING SCORE. The score required to pass the examination shall be based on the department's determination of the level of examination performance required for minimum acceptable competence in the profession. The department shall make the determination after consultation with subject matter experts who have reviewed a representative sample of the examination questions and available candidate performance statistics, and shall set the passing score for the examination at that point which represents niinimuni acceptable competence in the profession.

(6) EXAMINATION REVIEW. (a) An applicant who fails the examination may request a review of that examination by filing a written request with the department within 30 days after the date on which cxamination results were mailed to the applicant.

(b) An examination review shall be conducted under the following conditions:

1. The time for review shall be limited to one hour.

2. The examination shall be reviewed only by the applicant and in the presence of a proctor.

3. The proctor may not respond to inquiries by the applicant regarding allegations of examination error.

4. Any comments or claims of error regarding specific questions or procedures in the examination may be placed in writing on the form provided for this purpose. The department shall review the comments or claims in consultation with a subject matter expert. The department shall notify the applicant in writing of the department's decision. If the decision does not result in a passing grade, the applicant may retake the examination or file a claim of examination error pursuant to sub. **(7).**

5. An applicant shall be permitted only one review of the failed examination each time it is taken and failed.

(7) CLAIM OF EXAMINATION ERROR. (a) An applicant wishing to claim examination error must file a written request for department review in the department office within 30 days of the date the examination ***was*** reviewed, The request *shall* include:

1. The applicant's name and address;

2. The type of license applied for;

3. *A* description of the perceived error; including specific questions or procedures claimed to be in error; and

4. The facts which the applicant intends to prove, including reference text citations or other supporting evidence for the applicant's claim.

(b) The department shall review the request in consultation with a subject matter expert. The applicant shall be notified in writing of the department's decision.

(c) If the decision does not result in a passing grade, the applicant may retake the examination or request a hearing under s. RL 1.05.

(8) EXAMINATION RETAKES. (a) There is no limit to the number of times an applicant may take the examination.

(b) An applicant who reviews tlie examination pursuant to sub. ***(6)*** may not retake the examination within 30 days after the date on which the examination was reviewed.

(c) An applicant who passes the examination and remains unlicensed for one year or more after the date of the examination shall again take and pass the cxamination before being licensed.

History: Cr. **Register,** October, 1988, No. 394, eff. 11–1–88: r. and recr. (3) (a) to (h). am. (5), Register, December, 1994, No. 468, eff. 1–1–95; r. (2), r. and recr. (3), (4), (6), (7) (b) and (c) and am. (8), Register, November, 1997, No. 503, eff. 12–1–97.

RL **31.05 Denial of credential. (1)** An application for a credential under this chapter may be denied for any of the following reasons:

(a) The applicant commits fraud or misrepresentation in the application for a credential.

(b) The applicant has a physical, emotional or mental condition which might adversely affect performance of duties relating to the credential for which lie or she has applied.

(c) The applicant is dependent on alcohol to such a degree that it interferes with his or her physical or mental health or social or economic functioning, except that the department in the exercise of its discretion may issue a credential if the person submits to examination, evaluation, treatment, and monitoring **as** directed by the department.

(d) The applicant is addicted to the use of controlled substances or controlled substance analogs, except that the department in the exercise of its discretion may issue a credential if the person submits to cxamination, evaluation, treatment, and monitoring as directed by the depamnent.

(e) The applicant's conduct is a ground for discipline of a credential holder under s. RL 35.01.

(2) The department may require an applicant to undergo one or more physical, mental, alcohol or drug abuse evaluations and the department may consider the results of such evaluations if it believes that the results may be useful to the department in evaluating an applicant for a credential. The costs of evaluation shall be the responsibility of the applicant.

History: Cr. **Register,** January, 2001, No. 541, eff. 2–1–01

RL **31.06 Additional licensing requirements. (1)** In this section "trade name" means a name that is in addition to the name under which a person obtained a private detective agency license.

(2) **A** person who is licensed as a private detective agency shall, before doing business under any trade name, notify the department in writing of the trade name.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr., Register, November, 1997, No. 503, eff. 12–1–97.

Chapter RL 32

PRIVATE DETECTIVE AND AGENCY LICENSE RENEWAL AND REPORTING REQUIREMENTS

RL 32.01 Authority. The rules in this chapter are adopted pursuant to ss. 227.11 (2), 440.05 (7), 440.11 and 440.26 (3), (4), (5), (5m) and (5r), Stats.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; corrections made under s. 23.93 (2,) (b) 7., Stats., Register. December, 1994, No. 468; r. and recr., Register, November. 1991, No. 503, eff. 12–1–97.

RL 32.03 Renewal of license more than 5 years after renewal date. A private detective who applies for renewal of a license more than 5 years after the renewal date, as defined in s. 440.01 (1) (dm), Stats., shall successfully pass the licensing examination pursuant to s. RL 31.04 and pay the fee specified in s. 440.08 (2) (a) 61., Stats.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. Register, December, 1994, No. 468, eff. 1–1–95; am., Register, **January, 2001, No.** 541, eff. **2–1–01.**

RL 32.04 Change of name. A credential holder shall notify the department in writing within 30 days after a change of name or address.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. (1) and r. (2), Register, November, 1997, No. 503, eff. 12–1–97.

RL 32.05 Transfer of employment. (1) PRIVATE DETECTIVES. A licensed private detective who wishes to transfer employment from one private detective agency to another shall submit to the department a transfer application accompanied by the fee specified in s. 440.05 (7), Stats. The licensed private detective may not conduct licensed activity for the new employer until that person has mailed or delivered the transfer application and required fee to the department. Every licensed private detective shall notify the department of the name of the private detective's current employer or employers.

Note: Forms are available on request to the Department of Regulation and Licensing, Bureau of Direct **Licensing and** Real Estate, 1400 East Washington **Avenue.** P.O. **Box** 8935, **Madison,** Wisconsin 53708.

(2) PRIVATE SECURITY PERSONS. A licensed private detective agency shall notify in writing within **5** days of any change in the information which the agency has provided the department pursnant to s. 440.26 (5), Stats.

History: Cr. Register, October, 1988, **No. 394,** eff. 11–1–88; r. and recr., Register, **November.** 1997, **No.** 503, eff. 12–1–97.

RL 32.06 Termination of employment. (1) PRIVATE DETECTIVES. A licensed private detective who terminates employment with an employing private detective agency shall send written notice *to* the department within 10 days after the termination.

(2) PRIVATE SECURITY PERSONS. A private detective agency shall notify the department in writing within **5** days after the termination of employment of a private security person.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr., Register, **November,** 1997, No. 503, eff. 12–1–97.

RL 32.07 Change of owners or officers. (1) CHANGE OF OWNERS. (a) If an agency undergoes a change of owner, the former owner shall surrender the agency license to the department within 30 days after receiving written notice from the department of the issuance of a license to the new owner.

(b) The prospective new owner of a licensed agency shall apply for and receive an original agency license before engaging in business.

(2) If there is a change in any of the officers of a corporation or members of a partnership or a limited liability company, the agency shall notify the department of the change before new officers or partners take office. Officers or members of an agency shall comply with s. RL 31.02 (1) (h). This subsection does not apply to a change of registered agent by a foreign corporation holding an agency license, but a copy of any statement required under s. 180.1508, Stats.. to be filed with the department of financial institutions shall be tiled with the department within 30 days after a change of registered agent.

History: Cr. Register, October. 1988, No. **394.** eff. 11–1–88; am. (1) (b) **and** (2), Register, November, 1997, No. 503. eff. 12–1–97.

RL 32.08 Termination of private detective agency business. An agency which terminates its business shall notify and surrender the agency license to the department within 30 days after termination.

History: Cr. Register. October, 1988. No. 394, eff. 11–1–88.

Chapter RL 33

PRACTICE REQUIREMENTS

RL 33.01 Authority. The rules in this chapter are adopted pursuant to ss. 227.11 (2) and 440.26, Stats.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr., Register, November, 1997, No. 503, eff. 12–1–97.

RL 33.02 Private security persons to wear uniforms. A private security person holding a permit shall wear a uniform while on duty. A person may perform security guard services as a private security person without wearing a uniform only if the person is licensed as a private detective or is exempt by law from the requirement for a license or permit.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88.

RL 33.025 Private security persons to carry permits. A private security person shall have on his or her person while on duty as a private security person the private security permit issued to him or her by the department and, if carrying a firearm, the firearms permit issued to him or her by the department.

History: **Cr. Register, January, 2001, No. 541, eff. 2–1–01.**

RL 33.03 Identification tags. A private detective agency shall furnish all employes acting as private security personnel with an identification or name tag which shall at a minimum contain the person's name, number or other information which clearly identifies the person and the agency, or the person and the entity contracting with the agency. A private detective agency shall ensure that all employes who act as private security personnel wear identification or name tags which are visible to the public at all times and comply with this rule.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88.

RL 33.04 Agency photo identification. A licensed private detective agency shall furnish all employes acting as private detectives with an identification which shall contain at a minimum a current full face, head and shoulders color photograph of the person, the person's name and the name and address of the agency.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88.

RL 33.05 Badges, shields and stars prohibited. Licensed private detectives may not wear, use or display any badge, shield or star in the course of acting as a private detective.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; **am., Register, January, 2001, No. 541, eff. 2–1–01.**

RL 33.06 Contracts required. (1) Except as provided in sub. (2), a private detective agency shall enter into a written agreement with a client before providing services to the client. The agreement shall contain at least the following provisions:

(a) The date of the agreement.

(b) The parties to the agreement.

(c) A description of the services to be provided by the agency.

(d) A description of the fees required by the agency for the services to be provided.

(e) A description of how or when the agreement will terminate or may be terminated by one or both parties.

(2) A private detective agency is not required to enter into a written agreement in any of the following circumstances:

(a) In an emergency situation when the services of the private detective agency are required and there is no time to enter into a written contract before conducting the services.

(b) When providing services to an attorney.

(c) When providing services to another licensed private detective agency.

(d) When providing services to an insurance company.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr., Register, November, 1997, No. 503, eff. 12–1–97; **cr. (2) (d), Register, January, 2001, No. 541, eff. 2–1–01.**

Chapter RL 34

FIREARMS AND OTHER DANGEROUS WEAPONS

RL 34.001 Authority. The rules in this chapter are adopted pursuant to ss. 227.11 (2) and 440.26 (3m) and (5r), Stats.

History: Cr. Register, November. 1997, No. 503, eff. 12–1- Y7.

RL 34.01 General conditions relating to carrying a firearm. (1) No owner or employee of an agency may carry on, about or near their person any firearm unless all of the following apply:

(a) The circumstances or conditions of the owner's or employee's assignment as a private security person give rise to a substantial need for being armed.

(am) The agency requires the owner or employee to carry a firearm when acting as a private security person.

(b) The client and the agency agree in writing that the agency will assign armed security personnel to the client.

(c) The agency has received a permit from the department pursuant to s. RL 34.015.

(d) The owner or employee is not prohibited from possessing a firearm under s. 941.29, Slats., or any federal law.

(ej Subject toss. 111.321, 111.322 and 111.335, Stats., the owner or employee has not been convicted of a misdemeanor.

(f) The owner or employee is in uniform.

(fm) The owner or employee is on duty.

(g) The owner or employee complies with all federal or state laws or local ordinances when carrying a firearm.

(hj The owner or employee does not hold a temperately private security permit issued under s. 440.26 (5r), Stats.

(i) The agency has obtained a comprehensive general liability policy pursuant to s. RL 31.034.

(2) Except as provided in sub. (4), an owner or employee of any agency may not carry on, about or near the person any concealed firearm at a time when he or she is on duty.

(3) Except as provided in sub. (4), a private detective, while in uniform and on duty as a private security person, may only carry on, about or near his or her person a firearm when all the conditions in sub. (1) are satisfied. This subsection does not prohibit a private detective from having on, about or near his or her person a firearm which the private detective obtained and is holding as evidence in an investigation.

(4) A person who is a peace officer, as defined in s. 939.22 (22), Stats., may carry on, about or near his or her person a firearm, concealed or otherwise, when acting as a private detective or private security person, if the peace officer obtains a firearms permit from the department. The department may grant an cxccption from this requirement to a peace officer who submits to the department a letter from a law enforcement agency, written not more than one month before the date of receipt by the department, stating that the law enforcement agency will accept liability for the peace officer's use of a firearm while on duty for the private detective agency.

History: Cr. Register. October, 1958. No. 394, **cff.** 11–1–88; am. (1) (intro.), (a) to (c), cr. (1) (am), (d) to (g), (3) and (4), r. and recr. (2), **Register,** December. 1994, No. 468, eff. 1–1–95; am. (1) (intro.), cr. (1) (fm), Register, January, 1997, No. 493, eff. 2–1–97; am. (1) (b) and (d) and cr. (1) (h) and (i), Register, November, 1997, No. 503, eff. 12–1–97: **am. (4), Register, January. 2001, No. 541, eff.** 2–1–01.

RL 34.011 Conditions relating to transporting a loaded firearm in a vehicle. No owner or employee of an agency may transport a loaded firearm in a vehicle, unless all of the following apply:

(1) The firearm is in plain view. In this section "in plain view" means it is visible from ordinary observation to a person outside the vehicle.

Note: A firearm **located in** a **glove** compartment, **in a** briefcase, under a seat **of** a **vehicle,** or covered by the clothing of an occupant, **is** not "in **plain** view."

(2) If the firearm is a handgun, the owner or employee transports the firearm in a holster which is in plain view.

(3) If the firearm is other than a handgun, the owner or employee transports the firearm in a device inside the vehicle which locks the firearm in position and prevents an unauthorized person from removing the firearm from the locking device and which is in plain view.

(4) The owner or employee complies with the requirements in s. RL 34.01.

History: Cr. **Register,** January, 1977, No. 493. eff. 2- 1–97; am. (intro.), Register, November, 1997, No. 503. eff. 12–1–97.

RL 34.015 Permit granted by the department. (1) An agency shall apply to the department for a permit to authorize any of its owners or employees to carry a firearm when assigned to do so by the agency.

(2) The department may grant a permit to an agency pursuant to sub. (1) if the department has determined that all of the conditions and requirements in ss. RL 34.01, 34.02, 34.03 and 34.05 have been satisfied by the agency and the owner or employee who will be assigned by the agency to carry a firearm while on duty.

(3) A permit shall only be valid while the owner or employee performs private security services for the agency to which the permit was granted. When an owner or employee transfers employment to another agency, the other agency shall obtain a new permit before requiring or permitting the owner or employee to carry a firearm.

(4) The department may deny an application submitted to it pursuant to sub. (1) or may suspend. limit or revoke a permit which it has granted, if the department determines that the conditions and requirements described in sub. **(2)** have not been satisfied or do not continue to be satisfied. The department shall grant a hearing pursuant to ch. RL 1 or 2.

(6) The agency shall pay the reasonable costs incurred by the department in obtaining information relating to the eligibility and qualifications of each owner or employee to whom the permit applies, including the reasonable costs of criminal history record searches.

History: Cr. Register, December, 1994, No. 468, eff. 1–1–95; **r. (5), Register, January, 2001, No. 541, eff. 2–1–01.**

RL 34.02 Certificates of proficiency to carry a firearm. (1) Before an agency may receive a permit from the department pursuant to s. RL 34.015, the owner or employee who will

be assigned to carry a firearm while on duty shall obtain a certificate of proficiency in the care, handling and use of a firearm.

Note: A copy of Form #467, Firearms Certification of Proficiency, may he obtained from the Department of Regulation and Licensing, Bureau of Direct Licensing and Real Estate, 1400 East Washington Avenue. Room 281, P.O. Box 8935, Madison, Wisconsin 53708.

(2) Certification shall be received from a person who is employed by a firearms proficiency certifier by the department under s. RL 34.04. The certificate shall be notarized and shall include at least:

(a) A full and complete description of each type of firearm, the care, handling and use of which the owner or employee is proficient.

(b) Statements to the effect that the owner or employee has successfully completed the training required in s. RL 34.03. These statements shall include the date, time of day, the number of hours and the location where the owner or employee completed the training.

Note: A copy of the firearms training guide entitled "Demonstrate Care and Use of Firearms" as approved by the Wisconsin Law Enforcement Standards Board is available for inspection at the Bureau of Direct Licensing and Real Estate, 1400 East Washington Avenue, Room 281, Madison, Wf.

(3) A certificate of proficiency shall he valid for one year. An owner or cmployec shall obtain a new certificate of proficiency by satisfying the requirements in subs. (1) and (2), except that the training course shall consist of a 6–hour refresher course which more briefly covers the required course contents described in s. RL 34.03. A person approved as a firearms proficiency certifier under s. RL 34.04 may satisfy the 6–hour training requirement by conducting tbe 6–hour refresher course or the 36–hour course under s. RL 34.03 (1).

(4) An owner or employee who has not obtained a certificate of proficiency under this section at any time during the 5 years preceding the issuance of a permit by the department pursuant to s. RL 34.015 shall obtain a new certificate hy successfully completing the full 36–hour course, as required ins. RL 34.03.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r. and recr. Register, December, 1994, No. 468. eff. 1–1–95; am.(3). Register, November, 1997, No. 503, eff. 12–1–97.

RL 34.03 Training requirements for carrying a firearm. (1) GENERAL REQUIREMENT. Except as provided in sub. (2), completion of a training program of not less than 36 hours consisting of the following is required as a prerequisite for obtaining an initial certificate of proficiency to cany a firearm under s. RL 34.02. The training program shall consist of:

(a) Instruction in the dangers relating to the use of the firearm, safety rules, care and cleaning of the firearm.

(b) Training in the care, handling and use of the firearm, provided in accordance with the current firearms training guide which the Wisconsin law enforcement standards board has approved for training Wisconsin law enforcement officers. When the Wisconsin law enforcement standards board has approved a new edition of the training guide to replace an older edition, training which is received after the date of which a new edition is approved may be based on the older edition for a period not to exceed 12 months after approval of the new edition by the board.

Note: A copy of the firearms training guide entitled "Demonstrate Care and Use of Firearms" as approved by the Wisconsin Law Enforcement Standards Board is available for inspection at the Bureau of Direct Licensing and Real Estate, 1400 East Washington Avenue, Room 281, Madison, WI.

(c) Instruction in the legal use of firearms under the provisions of the Wisconsin criminal code and relevant court decisions.

(d) A presentation stressing the ethical and moral considerations which should be taken into account by any person who uses a firearm.

(e) A review of the law regarding lawful detentions.

(f) A review of the law on criminal and civil liability for intentional and negligent acts.

(2) EQUIVALENT TRAINING. A person who had received at least 30 hours oftraining. as described in sub. (1), except that the training did not include the provisions of Wisconsin law, as in sub. (1) (b) and (c), shall complete the 6–hour refresher course under s. RL 34.02 (3) to satisfy sub. (1), provided the person was authorized by another licensing jurisdiction or governmental agency to carry a firearm while on duty as a peace officer, a person who stands watch for security purposes or as a private detective at any time during the 5 years preceding application for a permit under s. RL 34.015.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; r and recr. Register, December, 1994, No. 468, eff. 1–1–95.

RL 34.04 Approval as a firearms proficiency certifier. (1) Before certifying the proficiency of an owner or cmployce to cany a firearm pursuant to s. RL 34.02, an individual shall obtain the approval of the department by submitting an application to the department on a form prepared by the department.

(1m) A peace officer is not required to file with the department fingerprints under sub. (5), provided that the peace officer submits with the application for approval a letter from his or her employing law euforcemcnt agency, written not more than one month before the date of the application and stating that the person is currently employed as a peace officer by the law enforcement agency.

(2) An applicant for approval as a firearms proficiency certifier shall at the time of application meet all of the following qualifications:

(a) The individual shall have received training as a police or security firearms instructor and shall provide evidence of one of the following:

1. Current approval as a firearms instructor by the Wisconsin law enforcement standards board.

2. Current certification as a law enforcement firearms instructor by the national rifle association.

3. At any time on or after January 1, 1995, was approved as a firearms instructor by the training and standards board in the Wisconsin law enforcement standards board or certified as a law enforcement firearms instructor, or a substantially equivalent designation, by the national rifle association and has completed a 6–hour firearms instructor refresher course within 12 months bcforc application for approval by the department. The refresher course shall be presented by a regional training school approved by the Wisconsin law enforcement standards board or by a staff instructor in the law enforcement activities division of the national rifle association.

(b) Notwithstanding ss. 111.321, 111.322 and 111.335, Stats., the individual shall not have been convicted of a felony and is not prohibited from possessing a firearm under any state or federal law.

(c) The individual has, subject toss. 111.321, 111.322 and 111.335, Stats., not been charged with a crime or convicted of a misdemeanor.

(4) The department may deny an application submitted to it pursuant to sub. (1) or may suspend, limit or revoke a permit which it has granted, if the dcpartmcnt determines that the conditions and requirements described in sub. **(2)** have not been satisfied or do not continue to he satisfied. The department shall grant a hearing pursuant to ch. RL 1 or 2.

(5) Except as provided in sub. (1m), an applicant shall submit to the department 2 complete and satisfactory sets of fingerprints to carry a firearm and the department may obtain a criminal history record search from the Wisconsin department ofjusticc and the federal bureau of investigation relating to the applicant before initially granting a permit for that individual

(6) The applicant shall pay the reasonable costs incurred by the department in obtaining information relating to the eligibility and qualifications of the application, including the reasonable costs of criminal history record searches.

Note: The Application For Approval of Firearms Proficiency Certifier, Form #1912, may be obtained from the Department of Regulation and Licensing, Bureau of Direct Licensing and Real Estate, 14W East Washington Avenue, Room 281, P.O. Box 8935, Madison, Wisconsin 51708.

(7) The approval of a firearms proficiency certifier shall expire on December 31 of each even–numbered year, unless the firearms proficiency certifier submits to the department an application for renewal and is reapproved by the department.

History: Cr. Register, October, 1988, Yo. 394, eff. 11–1–88; r. and recr. Register, December, 1994, No. 468, eff. 1–1–95; r. (3) and cr. (4), (5) and (6), Register, November, 1997, No. 503, eff. 12–1–97; cr. (1m), (2) (a) 1., 2., 3., (7), am. (2) (intro.), (b), (5) and (6), renum. (2) (a) to be (2) (a) (intro.), Register, January, 2001, No. 541, eff. 2–1–01.

RL 34.05 Agency firearms policy and laws. (1) Each agency shall file with the department a copy of its firearms policy before any of its owners or employees may receive a permit from the department pursuant to s. RL 34.015 and thereafter within 30 days after any substantial changes to it.

(2) Each agency shall maintain a current copy of ss. 939.48 and 939.49, Stats., relating to the use of force, and shall make these accessible to its owners and employees.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. Register, December, 1994, No. 468, eff. 1–1–95.

RL 34.06 Reporting the discharge of a firearm. If any owner or employee of an agency is responsible for the accidental or intentional discharge of any firearm other than in target practice, competition, or licensed hunting, or is responsible for the accidental or intentional use of deadly force by any means, the owner or employee shall immediately after the incident notify the local law enforcement agency where the incident took place and inform his or her supervisor of the incident. The supervisor or another person assigned by the agency shall investigate the incident as soon as possible, and shall make a signed, written report of the incident, identifying all persons involved in the incident, the investigator, and the agency, and fully describing the circumstances of the incident. As soon as possible after the investigation is completed, a copy of the report shall be filed with the department and with the local law enforcement agency.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. Register, December, 1993. No. 468, eff. 1–1–95; am. Register, August, 1995, No. 476, eff. 9–1–95.

RL 34.07 Other dangerous weapons. An owner or employee of an agency may only be armed with a dangerous weapon other than a firearm, which he or she, based on training, is proficient in handling. The person shall understand the legal limits of force with the weapon, the dangers and misuse of the weapon and the safety rules relating to the weapon. The agency shall, upon request of the department, provide documentation of the training or experience which prepared the person to be proficient in the use of the weapon.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. Register, December, 1994, No. 468, eff. 1–1–95.

RL 34.08 Replica of a firearm. No owner or employee of an agency may, at any time while he or she is on duty, carry on, about or near the person an object which looks like a firearm, but is not.

History: Cr. Register, December, 1994, No. 468, eff. 1–1–95; am., Register, November, 1997, No. 503, eff. 12–1–97.

Chapter RL 35

GROUNDS FOR DISCIPLINE AGAINST A PRIVATE DETECTIVE, A PRIVATE SECURITY PERSON OR A PRIVATE DETECTIVE AGENCY

RL 35.001 Authority. The rules in this chapter are adopted pursuant to ss. 227.11 (2) and 440.26 (2), (4m), (5m), (6) and (8), Stats.

History: Cr. Register, November, 1997, No. 503. eff. 12–1–97.

RL 35.01 Unprofessional conduct. The department may deny an application for renewal, limit. suspend or revoke a credential, or reprimand a credential holder upon proof that the credential holder or any owner of an agency has engaged in conduct reflecting adversely on professional qualification. Conduct reflecting adversely on professional qualification includes, hut is not limited to, any of the following:

(1) Performing private detective or private security related services while the ability of the credential holder to competently perform duties is impaired by mental or emotional disorder or alcohol or other drug abuse. A certified copy of an adjudication of mental incompetency shall constitute prima facie evidence of impairment by mental or emotional disorder under this subsection.

(2) Violating, or aiding or abetting the violation of, any law the circumstances of which substantially relate to the practice of a private detective or private security person. A credential holder who has been convicted of a felony, misdemeanor or ordinance violation, as defined in s. 440.26 (4m), Stats., shall send to the department within 48 hours after the judgment of conviction or the judgment finding that the person committed the violation, a copy of the complaint or other information which describes the nature of the crime or conviction and the judgment of conviction in order that the department may determine whether disciplinary action must or should be taken against credential holder.

(3) Operating under a name that is different than a name that the credential holder has provided to the department on an application for a credential or in other written form pursuant to s. RL31.06.

(4) Wearing, using or displaying a badge, shield or star in the course of acting as a private detective.

(4m) Failing to have on his or her person a private security permit while on duty as a private security person and, if carrying a firearm on, about or near his or her person while on duty, failing to have on his or her person the firearms permit issued by the department.

(5) Pretending to he a law enforcement agency or peace officer including hut not limited to:

(a) Operating a motor vehicle with flashing red or blue lights contrary to s. 347.25, Stats.

(b) Using the term "police department" in connection with advertising, badge, emblem, stationery, or vehicle.

(cj Intentionally wearing uniforms to closely resemble in style. color, accessories or insignia the uniforms of a police agency in whose jurisdiction the licensee conducts business.

(6) Using false, misleading or deceptive advertising.

(7) Advising any person to engage in an illegal act or course of conduct.

(8) Violating state or federal law rules or regulations related to the care, handling or use of firearms or other dangerous weapons.

(9) Violating any rule in chs. RL 30 to 35

(10) Employing any person who engages in any act or course of conduct for which the department may discipline a credential holder, if the employer knows or should know that the person is engaging or has engaged in the act or course of conduct.

(11) Failing to maintain a bond or liability policy for the period of licensure as required by s. 440.26, Stats.

(12) Neglecting, failing or refusing to render professional services to any person solely because of that person's age, race, color, disability, sex, sexual orientation, religion, creed, national origin, marital status, lawful source of income, or ancestry.

(12m) Violating the requirements for written contracts in s. RL 33.06.

(13) Assigning any person to perform private detective or security personnel duties who has not been issued a license or permit prior to performing the services or who has not properly notified the department of an employment transfer pursuant to s. RL 32.05.

(14) Failing to provide clients with an accurate written account of services within a reasonable period of time after having been requested to do so by the client.

(15) Issuing checks on business or trust accounts which contain insufficient funds.

(16) Employing a person under the age of 18 years to act as a private detective or private security person.

(17) Providing false information in the application for a credential.

(18) Providing false information to the department or its agent.

(19) Practicing without a current credential.

(20) Obtaining or attempting to obtain anything of value from a client without the client's consent.

(21) Obtaining or attempting to obtain any compensation from a client by fraud, misrepresentation, deceit or duress.

(22) Having disciplinary action through final board or agency action taken against one's credential in another jurisdiction.

(23) After a request by the department, failing to coopcratc in a timely manner with the department's investigation of a complaint filed against the credential holder. There is a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the department has not acted in a timely manner.

(24) Providing private detective services to a client in any situation where the exercise of the private detective's independent professional judgment on behalf of a client will be or is likely to be adversely affected.

(25) Providing services to 2 client? when the provision of services to one client directly and adversely affects the interests of the other client without the knowledge and written consent of the clients.

History: Cr. Register. October, 1988, No. 394. eff. 11–1–88; am. (2) and (12), cr. (12m), Register. December, 1994, No. 468, eff. 1–1–95; am. (intro.), (1), (2), (3). (10), (13), (17), (19), (22) and (23), r. and recr. (12m) and cr. (24) and (25), Register, November, 1997, No. 503, eff. 12–1–97; am. (l). cr. (4m), Register, January, 2001, Nu. 541, eff. 2–1–01; correction in (12m) made under s. 13.93 (2m) (b) 7., Stats.

RL 35.02 Discipline against agency for private detective violations. The department may take disciplinary action against a licensed private detective agency for violations of

chs. RL 30 to 35 committed by licensed private detectives or security persons employed by the agency.

History: Cr. Register, October. 1988. No. 394, eff. 11-1-88.

RL 35.03 Effect of suspensions, revocation or nonrenewal of agency license on agency employes. (1) Suspension, revocation or nonrenewal of an agency license shall terminate private detective or private security personnel activity by all employes of the agency.

(2) A credential holder employed by an agency whose agency license is suspended, revoked or not renewed by the department may transfer employment to another agency, provided that the private detective or private security person was not a party to the act or course of conduct which caused the suspension, revocation or nonrenewal of the agency license of the former employer.

History: Cr. Register, October, 1988, No. 394, eff. 11–1–88; am. (2), Register, November, 1997, No. 503, eff. 12–1–97.

Chapter Jus 14

SALE AND DISTRIBUTION OF OC PRODUCTS TO PRIVATE CITIZENS

Jus 14.01 Statutory authority. This chapter is established and adopted in compliance with s. 941.26 (4) (i) 2. and (j) 2., Stats.

History: Cr. Register, September, 1994, No. 465, eff. 10-1-94.

Jus 14.02 Objectives. The objectives of ch. Jus 14 are to establish content, performance, labeling, packaging and safety rcquiicmcnts of OC products sold in Wisconsin for use hy private individuals for solely defensive purposes.

History: Cr. Register, September, 1994, No. 465. eff. 10-1-94.

Jus 14.03 Definitions. In this chapter:

(1) "Aerosol canister" means a cylinder shaped container in which a gas under pressure or low boiling liquid is used to expel the contents containing the active ingredients.

(2) "Burst" means a firing of the OC product which lasts at least one– second in duration.

(3) "Camouflage OC product" means a device or container for the expulsion of oleoresin of capsicum which is designed to appear as something other than an aerosol canister.

(4) "Effective range" means that distance from which the OC product can be used effectively for defensive purposes.

(5) "Inert ingredients" means all ingredients of the aerosol canisier, other than oleoresin of capsicum.

(6) "OC product" means an aerosol canister which contains oleoresin of capsicum and inert ingredients.

(7) "Oleoresin of capsicum" means the oleoresin extracted from fruits of plants of the genus Capsicum. The oleoresin contains the active ingredient capsaicin and related compounds classified as capsaicinoids.

(8) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for a crime, whether that duty extends to all crimes or is limited to specific crimes.

History: Cr Register, September, 1994, No. 465, eff. 10-1-94.

Jus 14.04 Exceptions. Sections Jus 14.05 to 14.09, do not apply to sales for use by peace officers, armed forces, or national guard personnel.

History: Cr. Register, September, 1994, No. 465, eff. 10-1-94.

Jus 14.05 Maximum allowable amount of oleoresin of capsicum. An OC product that contains more than 10% of oleorcsin of capsicum may not be sold in Wisconsin

History: Cr. Register, September, 1994, No 465, eff. 10-1-94

Jus 14.06 Minimum and maximum effective range. An OC product sold in Wisconsin may not have an effective range greater than 20 feet and shall have an cffectivc range of at least 6 feet.

History: Cr Register, September, 1994, No. 465, eff. 10-1-94.

Jus 14.07 Weight of ingredients. An OC product sold in Wisconsin shall have a total weight of oleoresin of capsicum and inert ingredients of not less than 15 grams nor more than 60 grams.

History: Cr. Register, September, 1994, No. 465, eff. 10-1-94

Jus 14.08 Prohibition on camouflage OC products. No camouflage OC product may he sold in Wisconsin.

History: Cr. Register, September, 1994, No. 465, eff. 10-1-94.

Jus 14.09 Safety device. An OC product sold in Wisconsin shall have a safety feature designed to prevent unintentional discharge.

History: Cr. Register, September, 1994, No. 465. eff. 10-1-94.

Jus 14.10 Minimum labeling requirements. Any OC product sold in Wisconsin shall have affixed to the canister labeling with the following information:

(1) The percentage of the solution which is olcorcsin of capsicum.

(2) The total combined weight of the oleoresin of capsicum and inert ingredients.

(3) The effective range of the OC product.

(4) The name of the manufacturer.

(5) The date on which the useful life of the OC product expires.

(6) A warning that the OC product may be used for defensive purposes only.

(7) A warning that the OC product may not he used or possessed by a person under the age of 18.

(8) A warning that the OC product causes temporary harm and a general description of the harm.

(9) First aid information regarding the treatment of persons exposed to oleoresin of capsicum.

History: Cr. Register, September, 1994, No. 465. eff. 10-1-94.

Jus 14.11 Style of packaging. Any OC product sold in Wisconsin shall be in a sealed, tamper proof package.

History: Cr. Register. September. 1994, No. 465, eff. 10-1-94

Jus 14.12 Minimum information to be included in the packaging. Any OC product sold in Wisconsin shall have all of the following information placed on the packaging so that it is visible to the potential purchaser:

(1) The name of the manufacturer.

(2) A general description of the OC product.

(3) A warning that the OC product may be used for defensive purposes only.

(4) A warning that the OC product may not bc used or possessed by a person under the age of 18.

(5) A clear highlighted message cautioning the purchaser to read and follow the enclosed safety instructions.

History: Cr. Register, September. 1994, No. 465, eff. 10-1-94.

Jus 14.13 Minimum written safety instruction requirements. Any OC product sold in Wisconsin shall h a w

included with the product separate written safety instructions which shall contain the following information:

(1) The proper procedure for using the OC product.

(2) A complete listing of all the ingredients.

(3) An approximation of the total amount of bursts of which the Of product is capable.

(4) A description of the physical effects caused by the OC product.

(5) The proper procedure for storing the OC product.

(6) First aid and decontamination procediires for persons exposed to oleoresin of capsicum

(7) A phone number which can be contacted for further information about the OC product.

(8) A warning that the OC product shall be used for defensive purposes only.

(9) A warning **that** the OC product inay not be used or possessed by a person under the age of 18.

History: Cr. Register, September, 1994. No. 465. eff 10–1–94.

SUMMARY OF LAWS

DIRECTLY AFFECTING PRIVATE DETECTIVES AND PRIVATE SECURITY PERSONNEL

The law which directly affects private detectives and private security personnel is contained in Section 440.26, Wisconsin Statutes. Chapters RL 30 to RL 35 of the Wisconsin Administrative Code contain the rules which regulate private detectives, private detective agencies and private security personnel. There are other statutes and rules in this booklet which are related to the practice of private detectives and private security personnel. and such persons must be aware of these laws as they apply to the specific practice of such persons

CHAPTER 1

WHEN IS A LICENSE OR PERMIT REQUIRED?

A. Private Detectives. See Section 440.26 (1) of the Wisconsin Statutes and Section RL 31.01 of the Wisconsin Administrative Code on the following pages.

B. Private Security Personnel. See Section 440.26 (5) (b) and (c) of the Wisconsin Statutes and Section RL 31.01 of the Wisconsin Administrative Code on the following pages.

CHAPTER 2

BECOMING LICENSED OR RECEIVING A PERMIT

A. Private Detectives. See Sections RL 31.02, 31.03, 31.04 and 31.05 of the Wisconsin Administrative Code.

B.2 Private Security Personnel. See Sections RL 31.02 and 31.036 of the Wisconsin Administrative Code.

CHAPTER 3

RELATIONSHIP BETWEEN PRIVATE DETECTIVE AND CLIENT

A. Interviewing Prospective Clients

When a private detective first meets with a prospective client, there are numerous issues which must be clarified. For example, it is essential to discuss with the client whether or not the requested services are within the scope of the detective's practice, what the likely results will be, and the fees associated with the service. The private detective should also indicate his/her professional qualifications, the legally permissible services which can be performed and explore the client's motivation for seeking services. By discussing all of these issues, the potential client will be in a better position to understand his/her role and your services, and make an informed decision on whether or not to hire a private detective.

B. Establishing Guidelines

Once a potential client has decided to enlist the services of a private detective, there are several other steps which should be followed. A contract between the agency and the client is an important step to be implemented because it is the best way to identify

the work that is to be completed and estimate the fees that will be associated with the work. Also, a schedule should be developed for reporting information to the client. In standard situations, private detectives should report information to the client verbally and in writing at the conclusion of the service. The written report is the best way to inform clients of the services that have been provided. This written report should be in a grammatically correct form with direct reference to facts supported by field notes. In many instances, the client may want to remain informed on a more frequent basis. If this is the case, guidelines should be established in advance by the private detective and the client which outline the time frame for reporting information to the client. The private detective should avoid advising a client in areas relating to legal matters.

In instances where the client's attorney retains the private detective, the guidelines that are to be followed should be established with the attorney. It is important to recognize that the person who establishes the contract with the private detective is the client and all information should be directed to that person. However, when an attorney is working for the same client on the same case that the private detective is, lines of communication should be developed to ensure the most effective results. The attorney may want to consult with the private detective regarding the impression a potential witness interviewed by the private detective is likely to make on the jury. By not communicating effectively, much information may be overlooked which might influence the results of the investigation.

C. Expectations

When a private detective is hired by a client, there are numerous expectations that should be met. For example, when a private detective is hired by an individual who is a defendant in a criminal case, the objective is to gather information which might support a theory of defense. When the client is a retail establishment with theft problems, the objective may be to determine ways to eliminate the theft problem and/or to catch the thief. It is essential that the private detective realize that with different clients there will be different objectives and expectations and that these objectives and expectations will influence the work that is done. If the investigation reaches a point where the private detective feels further efforts will not be of benefit, the private detective should inform the client or attorney of this and let them decide whether or not the investigation should proceed.

CHAPTER 4

GATHERING AND PRESERVING EVIDENCE

A. SUGGESTIONS FOR FIELD NOTE TAKING

Accurate, thorough note taking when on assignment is very important. Whether you are gathering information, carrying on surveillance, or performing a protective service, you should not rely on your memory. You may be asked to recall an incident a long time after it has occurred. Without adequate notes, you cannot give an accurate report.

Here are some suggestions:

I. Be specific

When someone is interviewed, get the person's full name and address and phone number, if possible.

When observations are made of an unknown person or persons, write down as thorough a description as possible.
Always record date and time of observations and inci-dents. Record license plate numbers and descript-ions of vehicles -- type, make, color.
Note an observation or incident carefully and in sufficient detail so that if writing the report is delayed, the notes will be adequate

to provide a basis for the report without relying too heavily on memory.

Whenever it is relevant, note the weather or other conditions which could aid or hinder observation such as available light, distance of the observer from the transaction, etc.

When reviewing records and documents, thorough notes should be taken because they may often reveal potential leads and contacts. If specific notes aren't taken, it becomes time consuming to backtrack records and documents in search of information that is needed.

2. Be accurate

Take the time to get the correct spelling of the name and the correct numbers in an address or phone number. A little extra time taken to be accurate when notes are made will save a great deal of time that could be wasted later trying to correct an error.

It is always preferable to make observations in neutral, descriptive terms rather than in opinions. For example, it is better to report: Her clothes were wrinkled and dirty. He was unshaved. Her hair was uncombed -- than to simply write: He or she looked like a bum or whatever.

B. REPORT WRITING

Before beginning the report, it is important to consider the nature of the case, because this determines the content of the report. There are many kinds of reports. Plan and write the report to fulfill its purpose. Some reports will be very brief descriptions of one day's activities and observations. Some will require evaluation of a situation or procedure. While writing, keep in mind the reason you are collecting the information.

The first step in writing the report is to organize your notes. Detailed notes of all findings, contacts, and materials should be maintained to be included in the written report. Organize your notes in a logical order according to time, place, person and issue.

Be Complete. Include all necessary information including the sources of information. Make your report as specific as possible. Consider whether the report answers all questions the reader may raise. However, avoid being too wordy. Do not try to impress the reader except with the thoroughness of your work. Do not express opinions on the information unless your opinion has been requested.

Be Clear. Consider whether the reader will understand the ideas expressed by the words you use. Does each sentence express a complete thought? Does each paragraph contain one main idea?

Be Accurate. Be sure that information is correctly transferred from notes to report. Check to see that the report is free from errors in grammar.

Reports should only be provided to the attorney who has retained you or to the client if no attorney is involved.

C. STATEMENT TAKING

A statement is a written or oral assertion of certain facts pertinent to an investigation. The primary elements of a good statement are that it is voluntarily given, accurate, and properly validated. At a minimum, you should obtain the name, address, and date of birth of the statement giver, as well as their signature and a witness's signature. (It is advisable that you inform the statement giver that she/he is under no obligation to provide a statement and that any statement given could be used in legal proceedings.) The interview or statement session should he held in a private place free from interruption, where the person can present information freely. Witnesses should he interviewed separately, so that the testimony of one does not influence another. The investigator should refrain from influencing the content of the statement and should at all times appear to be simply seeking relevant facts. If the person is reluctant to provide information, it is appropriate to appeal to their sense of fairness and honesty in order to get them to continue the interview. If a person is genuinely uncertain of something, they should *be* allowed to simply state this. *If* at any point the person wishes to end the interview, the investigator should comply. To ensure the accuracy of the statement, the statement giver should review the statement. All statements should be signed, and supporting documents along with third party references in the statement will increase the validity and credibility of the statement. If the statement is swom before a notary public, it is called an affidavit. Statements from juveniles require the prior permission of the representing attorney. Once a Statement has been taken and included in a formal report, it can only be released to your client and his/her attorney, unless legal action allows or requires further release. In general, the specifics of any investigation should be considered confidential and shared only with your client and her/his attorney.

D. EVIDENCE

This section describes some elementary rules of evidence with which a private detective should he familiar. There are basically three types of evidence: testimonial, real and documentary. Testimonial evidence is evidence which comes frum the statements of witnesses or potential witnesses. Real evidence is physical evidence - tangible objects that are somehow related to an issue being tried in court. Documentary evidence is similar to real evidence, but it consists of a written materials or representations (e.g., will, deed, contract, picture, etc.) rather than a tangible object, All evidence is either direct or circumstantial.

1. Direct and Circumstantial Evidence

At trial, each item of evidence is offered for the purpose of proving a point. Direct evidence is evidence which itself proves the point if the evidence is believed. Circumstantial evidence is evidence which tends to prove the point if it is believed. Circumstantial evidence is information from which a person must reason that a point is proved. For example, if a witness testifies that he saw "A" stab "B" with a knife, this testimony is direct evidence that a stabbing took place and that "A" did it. On the other hand, if it is known that a stabbing took place and a witness testifies that he saw "A" run from the scene, this is circumstantial evidence that "A" did the stabbing. It is necessary to reason and conclude that if "A" ran from the scene, he is the guilty person.

2. Real or Documentary Evidence

Objects which act as real or documentary evidence may he direct or circumstantial evidence. For example, in a trial involving a dispute over a contract, the contract would itself be direct evidence of the terms of the agreement. If a stolen item is found in the possession of an employee, this is circumstantial evidence that this employee stole the item.

Real evidence presents particular problems for the private detective. Before real evidence will be admitted at trial, it must he shown to be authentic. This means testimony must be presented to show that this item is the actual item that is involved in the issues at trial. Furthermore, it must he shown that the item has not been changed or tampered with. This is significant for the private detective. Whenever you collect real evidence, you must he concerned with keeping it intact. If evidence is removed from the scene of a crime, you should first photograph the scene and then sketch the area with the evidence located in the sketch. When the evidence is presented in court, you will be called upon to testify as to how you handled the evidence. The record of how the evidence was handled or transferred is known as the chain of evidence, and is essential in determining the admissibility of evidence in a court. You should be able to positively identify the item. You should he able to testify that you handled the item so as not to damage or to change it in any way. It is recommended that the least possible number of people come in contact with the item, and that the item be kept in a secure place. Each person who comes in contact with the item will have to testify. If it cannot be shown that the item presented in court is the original item unchanged, it may be ruled not admissible as evidence.

3. Hearsay

As the jury system developed, there also developed rules of evidence designed to prevent unreliable evidence from reaching the jury. The most significant for the private detective, and probably the best known is the rule against admission of hearsay evidence. Generally speaking, hearsay evidence is a repetition of what the witness has heard from others or has read. It does not represent the actual knowledge of the witness.

There are several reasons for the rule against hearsay evidence. First, it is known that when information passes from one person to another, it frequently becomes changed. This makes it less reliable because it is likely to be inaccurate. Hearsay evidence is also objected to because statements made out of court are not statements made under oath. The speaker was not swom to tell the truth when he or she made the statement. Furthermore, there is no opportunity to cross-examine the actual speaker to test his or her powers of observation and his or her memory. This is probably the strongest objection to hearsay evidence. Also, the jury is not able to observe the appearance of the actual speaker. The witness' appearance is often an important consideration in judging the believability of the witness.

There are some exceptions to the rule against hearsay evidence. Certain kinds of hearsay are admissible. For instance, a statement made out of court by one of the parties in a court action is admissible. **A** party to the court action can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of belief except when he speaks under oath. Other exceptions to the rule against hearsay evidence include declarations made by a person who is dying, confessions, public records and business entries made in the regular course of business. These are all felt to be reliable for various reasons.

The significance of the rule against hearsay evidence is this. Whenever you are directed to gather evidence, you should keep in mind what information will be admissible and how ***it*** can be made admissible if it becomes necessary. For example, if you interview someone and gain some relevant information, you must be aware of the limits of that information. You may act on the information. You may report it to your employer. You may follow up on it and thereby leam further information. However, you may not, as a general rule, testify to it in court **unless** it falls within one of the exceptions (e.g., statement by one of the partiesj. This would be hearsay. The information may be testified to in court only by the person who originally observed or heard it. For this reason, when you report to your employer, you should report your sources of information as well **as** your information, and you must report your sources thoroughly so they can be located if that becomes necessary.

E. PREPARING FOR GIVING TESTIMONY

Whenever you are called upon to give testimony, there are certain rules of evidence which you should keep in mind. A witness is permitted to testify only to facts of which he or she has personal knowledge. This means that the witness may only testify to facts he or she has actually observed or perceived himself or herself. He or she may not testify to facts which others have told him or her unless the other person is a party to the court action. This would be hearsay. Testimony may also be given outside of a trial in the form of a deposition. The private investigator need not know the guilt or innocence of the accused. The most important elements for the private investigator to know are the facts regarding his/her testimony.

A witness is not permitted to give his or her opinion unless he or she is qualified as an expert in the matters on which he or she is testifying. He or she is not permitted to state his or her conciusions from the facts he or she presents. Conclusions are to be made by the jury or the judge if there is no jury.

Preparation is the best way to ensure giving good testimony. This can be done by reviewing your notes before you testify. However, if you review your notes before you testify, it is a good idea to bring them with you. You may be asked if you are testifying completely from your own recollection or if you have refreshed your recollection with your notes. If you have used your notes to recall the facts, then the attorney for the opponent may request to see them. The attorney is entitled to do so. Give simple and direct answers, unless asked to provide further detail.

It is essential that you tell the truth when you testify and answer directly the question that is being asked. Willfully giving false statements under oath is perjury which could result in legal action against you and will also damage your future credibility as a detective and a witness. When testifying under cross examination, be concise and brief in your responses. Finally, when giving testimony at a court proceeding, dress in a professional manner. The jurors will judge you by what you say and by your appearance. Therefore, it is important that you give credible testimony, be prepared and be presentable.

F. MAINTAINING FILES

Maintaining case files is an important part of the investigative process. It is advisable that a separate file be maintained for each investigation. **If** this is done, all information relevant to an investigation will be readily available, even if more than one person is working on the investigation. Files should be retained well after the investigation has been completed, since a trial or other developments may require information in the file even years after completion of the investigation. Maintaining a single comprehensive file on each investigation also helps the investigator to provide an accurate account of services, when this is requested by the client.

CHAPTER 5

THE LAW - CRIMINAL LIABILITY

The law applies to the private detective just as it does to every other person. In carrying out your investigative and other duties, you will probably have more opportunities to break the law than the average person. This is because you will often be seeking evidence of wrongdoing - evidence which someone else is attempting to conceal. The following is a description of crimes of which you should be aware. Keep in mind the penalties that may follow. (The laws referred to are printed in the back of this manual.)

A. WIRETAPPING - EAVESDROPPING

Wisconsin law authorizes only a law enforcement officer or government investigator to apply for a court order permitting the interception of communications. It is a felony in Wisconsin for a private individual to intercept and/or disclose wire or oral communications. The penalty for a conviction is a fine of up to $10,000 or imprisonment of up to five years or both. Additionally, a person who violates this law may be subject to a civil action by the person whose wire or oral communication was improperly intercepted, disclosed or used. Under this law, a private individual may not tap a telephone line. Additionally, installing a "bug" (a listening device) in someone's place of employment or home is not permitted. A person may not hire or otherwise persuade another person to intercept such communications. Furthermore, if in some way an individual comes into possession of information obtained illegally by a wire tap or a bug, that person is forbidden by law to pass it on or use it in any fashion

A person may only record a wire or oral communication when a party to the conversation has given prior consent before the recording. When one party has given consent, no criminal charges will result. This is the only circumstance under which a communication can be recorded. The concept of a "reasonable expectation of privacy" used within the law applies to any communication whether or not that conversation takes place in an area which is "open to the public". A speaker has a reasonable expectation of privacy that the contents of any spoken communication will be confidential and will be exclusively heard by only the intended party to the communication. The use of any electronic, mechanical or other device to listen or to record any

spoken communication, unless a party to the conversation has given his consent to the use of such a device, is forbidden by law. Evidence obtained when one party to a communication has authorized the interception is not admissible in court. The Wisconsin Supreme Court has ruled that only communications lawfully intercepted under court order may be introduced in court. (See generally sec. 968.27 - 968.31, Stats.)

B. FALSELY ASSUMING TO ACT AS A PUBLIC OFFICER OR EMPLOYEE; IMPERSONATING A PEACE OFFICER

It is illegal to pose as a public officer or public employee or as a peace officer. Acting as a public officer or public employee includes seeking information from another by telephone or otherwise, by falsely identifying oneself as a public officer or public employee. For example, if you telephone someone, identify yourself as a member of the district attorney's staff and thereby obtain information, you are violating this law. If you are found guilty of this, you may he fined not to exceed $10,000 or imprisoned not to exceed nine months, or both. (See sec. 946.69, Stats.)

Impersonating a peace officer does not require wearing a uniform. Identifying oneself verbally or with a badge or shield with the intent to mislead others is sufficient to result in a charge of impersonating a peace officer. If you are found guilty of this, you may be fined not to exceed nine months, or both. (See sec. 946.70, Stats.)

C. CARRYING A CONCEALED WEAPON

The law authorizes only a peace officer to carry a concealed and dangerous weapon. No other person is authorized to do so. A dangerous weapon is defined as any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm or any other device or instrumentality which, in the manner it is used, or intended to be used, is calculated or likely to produce death or great bodily harm. The penalty for carrying a concealed and dangerous weapon is a tine of not to exceed $10,000 or imprisonment not to exceed nine months, or both. (See sec. 941.23, Stats.)

When an individual is charged with carrying a concealed weapon, that weapon may he seized. It will then be sent to the Crime Laboratory, a division of the Department of Justice, for examination.

D. CRIMINAL TRESPASS TO A DWELLING

It is unlawful to enter the dwelling of another person without consent. The penalty for doing so is a fine of not to exceed $10,000 or imprisonment not to exceed nine months, or both. (See sec. 943.14, Stats.)

E. BATTERY

If you injure another while intending to injure that person or some other person, you may he charged with battery unless you had the right to use force under the circumstances. (See sec. 940.19 and sec. 940.20, Stats.)

F. FALSE IMPRISONMENT

You may not deprive another of his or her freedom without authority to do so. Detaining a shoplifter under the authority of the shoplifting statute or making an arrest under the "citizen's arrest" authority as described in the next chapter is lawful. However, the detained person may be held only as long as it takes to summon a peace officer or to transport the person to police authorities. Holding a person longer than is necessary to do this or with no intention of calling the police could result in a charge of false imprisonment. If you are found guilty of this, you may be fined not to exceed $10,000 or imprisoned not to exceed two years, or both. (See sec. 940.30, Stats.)

G. COMMISSION EMPLOYMENT

If, as a private detective, you are employed to detect employee dishonesty and you will be paid a percentage of amounts recovered through your work or a commission basis, any settlement made with an employee or fiduciary agent who has committed a dishonest act must be approved by a circuit judge of the county where the dishonest act took place. If the settlement is not submitted for approval, any such person or employer shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined no less than $100 nor more than $500, or imprisoned in the county jail not less than three months nor more than one year. (See sec. 134.57, Stats.)

CHAPTER 6

THE LAW - CIVIL LIABILITY

A. USE OF UNREASONABLE FORCE

For the private detective the use of force provides the greatest danger of civil liability - being sued in court after having caused an injury. You may use force only under limited circumstances. When you use force or attempt to use force without authority to do so, you and your agency are liable for the consequences of your action.

Wisconsin law allows you to use force against another in defense of your property. You may also use force to protect the property of:

1. A member of your immediate family;
2. A person whose property you have the legal duty to protect;
3. A merchant, if you are an employee or agent of the merchant

Only that amount of force which you reasonably believe is necessary to protect the property is permitted. According to the law, it is never reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of protecting property.

Wisconsin law also permits an individual to use force against another in self-defense. If you reasonably believe that another is threatening your health or safety or freedom, you may use only the amount of force necessary to stop or prevent harm to yourself. You and your agency may not be liable for injuries you cause if you used only a reasonable amount of force. If you overreact and use excessive force, you and your agency may be liable for the injuries you caused. For example, if you are detaining a shoplifter and the person attacks you, you may use force to defend yourself and to subdue the person you are detaining. You must not lose your temper and attempt to "get even".

You may not use force intended or likely to cause death or great bodily harm, such as a gun, unless you reasonably believe it is necessary to prevent death or great bodily harm to yourself.

You lose the right to use force against another in self-defense if you provoked the person to act against you. In this case, you will be liable for the injuries you caused.

You may use force to defend someone else if you reasonably believe:

1. That under the circumstances this other person would be permitted by law to use force in his or her own defense; and

2. That it is necessary for you to act to protect this person

B. AGENT - AGENCY RESPONSIBILITY

When an injury occurs - physical or otherwise - the agency will be liable as well as the private detective who caused the injury. The law requires the agency to share the liability in order to assure that the injured person will be able to collect damages for his or her injury. It is far more likely that the agency will have the money to compensate an injured person than will the private detective. Requiring the agency to assume liability for its employees is also justified on the grounds that the private detective is performing the business of the agency. In fact, the Wisconsin Supreme Court has ruled that an employee is entitled to security against liability to another person arising from performance of duties. This security comes from the agency assuming responsibility for injury to other persons.

The fact that the agency is liable to persons who are injured by its employees does not entirely let the private detective off the hook, however. When the injury is caused by negligence on the part of the detective, the agency is entitled to require the detective to pay back to the agency the amount it paid to the injured person. The agency does not always seek repayment from its employees, but it is entitled to do so by law. An agency is also entitled to seek repayment from its employees when the injury occurred while the detective was violating specific instructions.

The agency is not liable for injury caused by its employee unless the employee was performing agency business when the injury occurred.

C. FALSE IMPRISONMENT

As a private detective, you and your agency may face a lawsuit for actions that fall short of causing actual physical injury. If you unlawfully interfere with the physical liberty of another, you and your agency are liable for compensatory damages. This means that the person who suffers a loss of his or her personal liberty, even though it is only temporary, is entitled to be compensated for that loss. The law provides that the individual who caused the loss of liberty shall be the one to pay.

A loss of liberty may occur when you are questioning an employee about dishonest acts and you refuse to permit the employee to leave. It may occur when you detain a suspected shoplifter without probable cause to believe he or she has shoplifted. It will occur anytime you deny a person his or her liberty without authority to do so.

You are permitted by law to detain a suspected shoplifter when you are employed by the store involved. The law provides that a merchant or his or her adult employee may detain a person whom he or she has probable cause to believe:

1. Has altered the price tag on an item or exchanged price tags on items; or

2. Has intentionally concealed unpurchased merchandise which continues from one floor to another or beyond the last station for receiving payments in a merchant's store

Probable cause means the facts and circumstances permit a person of reasonable caution to believe that the suspected person has committed an act of shoplifting.

This detention must he done in a reasonable manner and only for a reasonable length of time to deliver the person to a peace officer or to his or her parent or guardian in the case of a minor. You must promptly inform the detained person of the purpose of the detention. You must permit him or her to make phone calls. You may not interrogate or search him or her against his or her will. (NOTE: laws authorizing use of force to protect property or in self-defense and the shoplifting law appear in the back of this manual.)

You are also authorized by law to make a "citizen's arrest". Every citizen has the authority to arrest a person he or she has probable cause to believe is guilty of a felony he or she knows has been committed. A citizen may arrest a person who is committing a breach of the peace in his or her presence. Breach of the peace is an act which involves, threatens or incites violence.

A citizen making an arrest must clearly indicate his or her intention to the other person. He or she must indicate for what offense the arrest is being made. As soon as possible, he or she must tum over custody of the person to a peace officer. If these requirements are not met, the citizen may be liable for false imprisonment. In reality, you will seldom, if ever, use this "citizen's arrest" authority. It is customary and safer for all persons involved to leave the arrest to the police.

D. NEGLIGENCE

Negligence is another frequent source of civil liability. An individual is always liable for injuries or damage to property he or she causes by being negligent. Such injuries or damage do not necessarily stem from unlawful acts. They are the result of a lack of proper caution.

Injury through negligence can occur when you are lawfully using force against another. It can happen if you are not careful that bystanders are not injured. It can occur when an individual expects to use only minimum force against another, but through lack of caution uses greater force. For example, if you are serving as bodyguard for a popular entertainer appearing in your city, part of your duties will be to keep people from rushing the stage. Suppose that while you are attempting to block someone from reaching the stage, you knock that person down causing injury. You may be liable for that injury unless that amount of force was necessary to protect your employer or yourself.

You and your agency will also be liable for property damage that results from negligence in the performance of your duties.

E. LIBEL -SLANDER

One other area of possible liability remains to be discussed. This is verbal attack. The law provides that when an individual makes statements which question or attack the character or morality of another, that individual is liable for personal and professional injuries suffered by the other person. When that individual is a private detective, both the detective and the agency will be liable. Care must be taken when making verbal or written statements about others. An intentionally false and malicious verbal statement could constitute slander, and a similar written statement could he considered libel. The statements must be made within the hearing of other persons or be published to lead to liability. If the statements are true, then there is no liability. Here is where the private detective must he careful. Accusations and verbal abuse (name calling, obscenities and the like) which are made in public may result in a lawsuit. You may believe that confronting a suspected wrongdoer loudly in public will cause him or her to back down or to confess. You must be certain the accusation is true. Furthermore, you must remember that even if your accusations are true, you are not eligible to make further abusive statements unless those also can be proven.

This has been a brief description of the possible civil liability facing the private detective and private detective agency. Civil liability is a complex subject. In each case, the liability of the persons involved is closely related to the facts and circumstances surrounding the injury. It is suggested that when the possibility of civil liability occurs the agency or private detective may find it advisable to consult with an attorney.

CHAPTER 7

INVESTIGATIVE SERVICES

In the sections which follow, some of the various services offered by private detective agencies will be discussed. What authority the detective has in various situations will be considered. Some of the possible legal consequences of exceeding that authority will also be considered.

It is important for you to remember that the private detective license issued by the State grants no special privileges or authority to you other than the privilege to operate as a private detective. The licensed private detective has the same authority towards other persons as any other private citizen. He or she has no greater authority to arrest, search, question or use force against another person than any other citizen. A private detective is NOT a police officer. In short; a private detective must conform to all criminal and civil laws of the state and statutes and rules of the department.

A. STORE DETECTIVES

A good deal of private detective work involves retail establishments. Shoplifting has become a serious problem. Many stores contract with priwte detective agencies to provide investigative and protective services.

Wisconsin has a law authorizing merchants and their adult employees to detain suspected shoplifters. (See sec. **943.50,** Stats.) The law is not specific as to the procedure that should be followed, however. A suspected shoplifter may be detained for a reasonable length of time. The law is purposely vague. What is "reasonable" will depend on the circumstances of each situation. There are some recommendations that can be made.

First of all, be certain *of* your facts. *The* law requires you to have probable cause to believe that the suspected person has shoplifted. To avoid liability for false imprisonment, it is a good idea to personally observe the act or assure yourself that a person who reports to you has actually seen the act. Be sure that the suspected person is thereafter kept in sight. Otherwise, the item may be returned or dropped off somewhere and you will be gravely mistaken when you confront the person.

When you approach a suspected shoplifter, it is advisable to do it quietly. It is not necessary to challenge the person loudly. In fact, from the standpoint of public relations as well as potential cooperation from the suspected person, you will be more effective if you make as little disturbance in the store as possible. Request the person to move out of the flow of traffic. Explain your reason for stopping the person.

Detaining the person a reasonable length of time means the length of time it takes to summon a peace officer. Detaining a person in a reasonable manner may depend on the circumstances. You must permit the person to make phone calls. You should not purposely make the person physically uncomfortable, such as forcing the person to remain standing, refusing to permit the person to go to the bathroom, etc.

The shoplifting law specifically forbids you to interrogate or search the person against his or her will. You may, of course, continue to question the person as long as he or she is willing to continue answering. You must he careful when questioning about a crime, however. Such questions are accusations and cannot avoid being threatening. You may not use threats, force or other coercion to obtain information.

The requirement of obtaining consent before you interrogate or search another person carries over to all other investigative activities you perform. There is no lawful authority for an individual, other than a peace officer, to search or question another. You may question a person as long as he or she is willing to answer. You may not search another person or that person's house or car or other property unless that person gives his or her consent to the search.

It is a good idea to get a consent in writing - signed by the person or to have a third person witness the verbal consent. You should not use threats or false promises to encourage a person to answer questions or consent to a search. You may obtain the information or evidence you seek; however, if you obtain it by coercion, it might not be admissible in court. Therefore, if a prosecution is your goal, you may be spoiling your chances.

B. SHOPPING SERVICES

Some private detective agencies also perform shopping services for retail merchants. When this work involves checking on employee honesty, a private detective license is required. The cautions regarding interrogations and search hold true for these activities also.

Persons employed to act as shoppers in business establishments and report on the efficiency of employees, the quality of services or the condition of the premises are not required to be licensed as a private detective.

C. SURVEILLANCE

Surveillance activities may be called for in numerous situations. Divorce actions and insurance claim actions frequently lead to a need for surveillance. Businesses, such as trucking companies, will sometimes request surveillance of their employees if stock shortages appear. Some investigations reach a point where no further progress can be made without surveillance. Unless surveillance is the clearly the best method for obtaining information, the investigator should be sure that his/her client has been notified, before using surveillance.

It is important to keep an accurate, detailed record of your surveillance activities. Your observations may be needed as evidence in court. You must be able to be as specific and certain of your facts as possible. A detailed report with place, date, time and accurate descriptions of observations will provide a basis for strong testimony in court.

If your surveillance work also involves taking photographs, remember the rules regarding physical evidence. If the photographs are to be admitted as evidence, you will have to testify as to when they were taken. You must be able to testify that they accurately represent your observations and that they have not been tampered with.

A private detective may also be engaged in activities which bring him/her into contact with police or criminal activities. A private detective has the responsibility to report any evidence of criminal activity to law enforcement authorities. Prior to a surveillance or stake out, it is also advisable to inform local authorities, so that the activities of the private detective do not become the object of a police investigation. Proper communication and interaction with law enforcement agencies can lead to exchange of information, cooperation and prevention of crime.

Under no circumstances does the private detective have the authority to enter or access private residences or property without permission while on a surveillance. Use of audio or video recording to document speech or activities which are publicly accessible is an acceptable investigative technique. Such recordings made via unauthorized access to private buildings or property are not acceptable.

D. UNDERCOVER INVESTIGATION

Businesses which are experiencing problems such as theft or other internal security problems will sometimes hire a private detective to do undercover investigation. You make your observations and gather information from your co-workers during and after working hours.

This type of investigative service calls for detailed note taking and reporting writing. You are gathering evidence which may lead to prosecution for a crime. Although you may not be called to testify, your information may be used as the basis for a further police investigation. It must be accurate. (Some agencies prefer that their detectives not testify in court after working undercover. It could expose them to retaliation by the defendant. Therefore, the police are brought in to complete the investigation and make the arrest.) Sometimes the employer will not wish to prosecute the wrongdoers. The employer may wish to simply terminate the employee. Nevertheless, your report must be accurate and thorough to avoid mistakes.

E. BACKGROUND INVESTIGATION

The private detective may be called upon to do many different types of investigations, and should know what is relevant to investigate. In evaluating the credit rating of a subject, for instance, it is important to focus on the income and debt status of the subject. Factors such as property owned, type of automobile or marital status are much less useful. Some records, such as credit reports and tan records, are not legally obtainable without written permission from the party involved.

When conducting investigations, information must be verified by the investigator. Copies of records and references should be obtained or verified personally. When reviewing police, forensic or crime lab reports, the private detective should be familiar with acronyms and abbreviations commonly used in these reports. Although interviews are often valuable, unverified statements should not be accepted as factual. Court records, except for juvenile actions, are also available to the public and may be of use. Circuit courts have records of tax liens which have been filed against an individual and the Clerk of Courts office has information on arrests and convictions, as well as civil judgments and small claims actions. The names of property owners are listed with the Register of Deeds office. With an appropriate release for information, records on work injuries are available from the Worker's Compensation Division of the Department of Industry, Labor and Human Relations. Although the subject of a background investigation is often not aware of the investigation, there may be circumstances where the subject should be informed.

INDEX

TO THE WISCONSIN STATUTES AND ADMINISTRATIVE RULES REPRINTED IN THIS BOOKLET

References are to statutes sections or administrative rules. Administrative rules citations begin with the **prefix** "JUS" or "RL"